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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 975.

EX PARTE: WILLIAM L. ROYALL, No. 2, APPELLANT AND PLAINTIFF IN ERROR.

APPEAL FROM AND IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

FILED SEPTEMBER 25, 1885.

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1 In the Circuit Court of the United States for the Eastern District of Virginia.

Ex Parte WILLIAM L. ROYALL No. 2.

Be it remembered that heretofore, to wit, on the 29th day of May, A. D. 1885, came William L. Royall, the petitioner, and filed in the clerk's office of the circuit court of the United States for the eastern district of Virginia his petition for a writ of *habeas corpus*, which petition is as follows, to wit:

Circuit Court of the United States for the Eastern District of Virginia.

Ex Parte WM. L. ROYALL No. 2.

To the honorable justices of the circuit court of the United States for the eastern district of Virginia:

Your petitioner, William L. Royall, would respectfully show that under the provisions of an act of the General Assembly of the State of Virginia approved March 30th, 1871, entitled "An act to provide for the funding and payment of the public debt," the State of
2 Virginia issued her certain bonds, with interest coupons thereto attached, which coupons bore upon their faces the contract of the State of Virginia that they should be received in payment of all taxes, debts, and demands due to said State. That by the provisions of another act of her General Assembly approved January 14th, 1882, it is enacted that her officers shall not receive said coupons in payment of taxes due to her until judgment has been rendered in a suit brought on said coupons, according to proceedings provided for in said act. That the validity of this last-mentioned act was assailed in the Supreme Court of the United States in the case of Antoni *vs.* Greenhow, reported in the 107th volume of the reports of the decisions of the Supreme Court, and its validity sustained upon the ground that said act furnished tax-payers with a sufficient remedy to enforce said contract. That by the provisions of the 90th and 91st sections of chapter 450 of the laws of Virginia for the year 1883–'84 it is provided that attorneys-at-law who have been licensed to practise law less than five years shall pay a license tax of fifteen dollars, and those who have been licensed more than five years twenty-five dollars; that such revenue license shall entitle the
3 attorney paying it to practice law in all the courts of said State. That it is further provided by said 91st section that no attorney shall bring any suit on said coupons under said act of January 14th, 1882, unless he pay, in addition to the above-mentioned license tax, a further special license tax of two hundred and fifty dollars. That your petitioner has been licensed to practice law more than five years, and that in the month of April, 1884, he paid to said State twenty-five dollars, and received from her a revenue license to practice law in all the courts of said State, but that he has not paid the additional special license tax of two hundred and fifty dollars provided for in said 91st section. That under the employment of a client who had tendered coupons issued by said State under said

act of March 30th, 1871, to the treasurer of Richmond city in payment of his taxes, which coupons had been received by said treasurer for identification and verification, and certified to the hustings court of the city of Richmond, and thereafter had paid his tax in money, he brought a suit under said act of January 14th, 1882, to recover said money back after proving the genuineness of
4 said coupons. That the grand jury of the city of Richmond thereupon found an indictment against your petitioner for bringing such suit without having paid said special license tax. That he brought said suit after he had paid his license tax above mentioned and while he had a license to practice law until April, 1885. That he was thereupon arrested by order of the hustings court of the city of Richmond and committed to the custody of N. M. Lee, sergeant of said city, and that he is about to be tried and punished under said indictment. That said act, which requires him to pay said special license tax in addition to his general license tax, is repugnant to section 10 of article one of the Constitution of the United States, and is therefore null and void, and the act providing for punishing your petitioner for not paying said special license tax is likewise repugnant to said Constisution.

Your petitioner would respectfully show the following grounds upon which the said acts are repugnant to the Constitution of the United States: When the State of Virginia enacted said act of March 30th, 1871, she desired to free herself from one-third of her debt, which she thought that the State of West Virginia equitably owed. She therefore offered to her creditors that if they would re-
5 lease her from one-third of their claims, she would give them new bonds, with interest-coupons attached, receivable for taxes. In other words, she promised that she would pay the holder of a $1,000 bond sixty dollars a year in semi-annual instalments, and that if she did not, he, if he were a tax-payer, might pay his taxes with the coupons, and if he were not a tax-payer that he might sell them to a tax-payer, who might pay his taxes with them. Now the agreement that the coupons should be received from the bearer of them in payment of any taxes that bearer might owe the State was the consideration which moved the creditor to releasing the State from said third of his demand, and the new contract necessarily, *ex vi termini*, carried with it, as an incident, the right to employ the services of those who were skilled in conducting proceedings in the courts, in case the holder of the coupons was required to resort to the provision making it receivable for taxes, to make it available. The coupons were not issued exclusively to those skilled in legal procedure. They are offered indiscriminately to any and all persons who may happen to be creditors of Virginia, whether they be lawyers or whether they be laymen. The court must surely
6 take judicial notice of the fact that those who are unskilled in legal procedure are incapable of conducting for themselves the litigation demanded by the acts of January 14th, 1882.

It is so perfectly well understood that a layman is incompetent to conduct proceedings in a court that the very rules of this honorable court forbid any but persons who have had long experience to ap-

pear at its bar, and the laws of the State of Virginia forbid any but skilled and licensed persons to conduct causes in her courts. It is a matter of such universal knowledge that none but skilled persons can conduct the litigation provided for in the act of January 14th that it must be held that when the State put out the coupon she agreed, as part of her contract, that if she did not pay her interest and then compelled the coupon holder to resort to her courts to make the coupon available as a tax-paying instrument, that he should have the right to avail himself of the services of those who understood the methods of conducting a cause in court through its various stages. It would be nonsense to say that the State reserved to herself the right to force the coupon holder into a lawsuit before he could make his coupon available, but also reserved the
7 right to exclude him from the services of a lawyer to conduct his lawsuit. It is too clear for argument that the contract carried with it as an incident the right to employ an attorney to conduct the lawsuit, if the State forced a lawsuit upon the holder as a condition to his making it available.

Now, if the State reserved a right to make an attorney pay a license tax before he should be permitted to conduct the suit which she forces the coupon holder to bring, then her contract that she will receive the coupon for taxes is utterly valueless, for if she can make him pay a tax of one cent she can make him pay a tax of one million dollars; and all that she need do to rid herself of her contract is to forbid her officers to receive the coupons and then to tax the lawyers so heavily for bringing suits upon them as to make it impossible for them to bring suits.

Let it be distinctly understood that the question of the tax is not one of degree; by no means. It is not intended that the imposition of this tax is void, because it is so onerous as to be unreasonable. The proposition maintained is that the State cannot impose a tax of one cent, because she contracted that the holder of the
8 coupon might have all the ordinary means for enforcing a reception of his coupon in case she refused to receive it, and if she may burden the resort to those means by taxing that resort one cent, she may so burden them as to make a resort to them impossible. The proposition contended for is that she contracted that she would not tax the lawyer who brought coupon suits, and that it would be a violation of her contract for her now to tax him. She may, undoubtedly, tax a lawyer by a license tax for exercising his profession of lawyer. The limit to which such power of taxation may go is the limit of what is reasonable. The law protects the farmer in tilling his fields and tending his flocks. The farmer's fields and flocks must, therefore, bear their portion of the burdens which the maintenance of government require. So the law protects the lawyer and the doctor in the exercise of their callings, and each must contribute his ratable proportion of the costs of sustaining the law. The State cannot forbid the lawyer or the doctor to practice his profession, nor can she impose such a burden upon either as would amount to prohibition. All she can do is to make each give up such a proportion of what he earns under the protec-

tion of the law as bears a just proportion, as nearly as can be
9 estimated, to what the farmer pays on his land and cattle.

Now, the State may, undoubtedly, tax the lawyer for exercising his calling as a lawyer, and because he adds to the general business of a lawyer the particular business of bringing coupon suits, under the act of January 14th, he cannot therefore claim exemption from taxation. But if he will forego all other law business, and confine himself exclusively to the business of bringing suits under the act of January 14th, 1882, then it is insisted that he may do that business without paying one cent's license tax; because, if the State can make him pay one cent, she can charge him what she chooses, and thus disable the coupon holder to make any use whatever of his coupon. It is her contract which disables her to make the charge.

Neither the act complained of in this proceeding nor any other one of those complained of at the same time in this court should be considered separately and to itself. Taken altogether, they form a series of acts passed by the Virginia Legislature at various intervals, beginning in January, 1882, all aimed at the same end. As they are all acts *in pari materia*, they are all to be considered to-
10 gether as forming separate sections of one act, and they are all so intimately connected together that if it should be found that all together impair the obligation of the State's contract, then all must fall together.

Now, let it be observed that the coupon contains two contracts—one, that the State will, on the first day of January or July, as the case may be, pay the bearer thirty dollars; the other, that if she do not, the bearer may pay her what he owes her with the coupon. If she observes her first promise and pays the coupon, no controversy can possibly arise in respect to the second. It is only when she deliberately repudiates her first engagement that the second can come under discussion. Now, she has deliberately repudiated her first promise. The 15th section of her act of February 14th, 1882, providing for funding her debt anew, forbids her officers to pay interest upon any bond except such as may be issued under the provisions of that act. The coupon holder is thus forced to resort to the subsidiary promise or else abandon his coupon. When we look to the legislation that she has adopted, that bears upon this subsidiary contract, the first thing that strikes the attention is the provision of the act of January 26th, 1882, (acts 1881–'2, p. 37,) and that of
11 the act of January 14th, 1882, (Ib., p. 10,) which forbids the tax collector to receive coupons for taxes until the end of a vexatious and harassing law suit. If these acts stood alone, the coupon holder could make no complaint of them since the decision of this court in the case of Antoni *v.* Greenhow; but when that case was decided they stood alone—what they do not do now—and since they have been subsequently supplemented by other legislation which did not exist when Antoni *v.* Greenhow was decided, it is insisted that they may now be referred to as constituting part of one general plan which had not been unfolded at that time, the full development of which completely annihilates the coupon.

What are the subsequent and additional acts?

1st. The first section of chapter 540, acts 1883–'84, p. 721, provides that the second auditor shall open an account against each bond, and whenever a coupon from that bond comes into the treasury he shall credit the bond with what would have been paid to it as interest if it had been surrendered and a new one taken at the rate of fifty-three cents on the dollar, bearing three per cent. interest, and the residue of that coupon shall be charged against the prin-
12 cipal of the bond and deducted from that principal at the bond's maturity. This is, of course, intended to scare the bondholder into surrendering his bond and taking the new bond, which is really for but one-fourth of the old one.

2d. By the provisions of chapters 83, 153, and 450, pp. 120, 189, and 561, acts 1883–'84, the payment of any license tax in coupons is absolutely prohibited under any conditions whatever. It is enacted by those statutes that license taxes shall be payable in gold, silver, and current paper money only. Thus it is attempted to exempt one-quarter of the State's revenues wholly and entirely from the operations of the coupons. This leaves nothing but the direct taxes on real and personal property for the coupons to affect.

3d. By the 65th section of chapter 450, acts 1883–'84, p. 590, all persons are forbidden under penalties to sell the State's coupons to her taxpayers until they have first paid her a special license tax for the privilege of $1,000, and, in addition thereto, the seller is required to pay her twenty per cent. of the face value of the coupon sold. This is almost prohibition to selling *to selling* the coupons. But it is absolute prohibition in theory, since she may make
13 the tax more than the coupon, if she can make it anything. As the taxpayer is one person and the owner of the coupon another it is difficult to understand how he is to get coupons with which to pay his taxs under this law.

4th. The State refuses to pay the coupon; she forbids her officers to receive it for taxes until a complicated lawsuit has been ended; she thus forces a lawsuit on the coupon holder, and then requires his attorney to pay her a special license tax of $250 for the privilege of bringing the suit which she forces on the tax-payer. In other words, she claims the right to deprive him of the aid of a lawyer in the lawsuit which she forces on him.

5th. Chapter 397, acts 1883–'84, p. 504, makes it the duty of the attorney for the Commonwealth in each county to defend every suit brought on coupons under either the act of January 14th, 1882, or that of January 26th, 1882, whether there be any defence or whether there be not; and if the decision of the case is against the State it is made his duty to take an appeal, whether there be any grounds for an appeal or whether there be not. With the thousands of appeals thus forced into the court of appeals, how is it possible to make the remedies provided for available? It would take a century to
14 hear all the appeals which the suits of one year would bring up.

6th. If the tax-payer, discouraged by these impediments, determine that he will abandon all hope of actually paying his taxes with

his coupon, and stand upon his tender of it, thus using it as a barrier between the State and himself, he finds his situation no better. The act of January 26th, 1882, p. 37, 38, forbids any court to grant him an injunction to restrain the State's officers from seizing his property for his tax, although he has tendered her coupons in payment of it; and the 3d section of chapter 421, acts 1883–'84, p. 527, forbids him to sue the officer for his trespass in seizing his property after he has tendered him coupons in payment of his tax. He therefore has no redress whatever.

Thus the owner of one of the State's coupons is absolutely boycotted, so far as it is within the power of the Legislature of Virginia to boycott him. Of all persons in the world he is the only one who can claim no protection from the law, and the law places him absolutely outside of its pale. On what principle can it be shown to be a crime, so very heinous in its nature, for one of Virginia's tax-payers to own one of her coupons?

15 Suppose that, when the State of Virginia, in 1871, was begging her creditors to release her from one-third of her debt and take this tax-paying property of the new coupon as compensation for the release, she had told them that she reserved in her arsenal all these weapons to discharge at them when it suited her convenience so to do, how many of her bonds would have been surrendered to her? Is not the fact that she expressly reserved no right to enact this hostile legislation complete proof that she agreed with the creditor that she would enact no legislation hostile to the tax-paying quality of his coupon? Is not all this legislation inconsistent with the terms of the contract? And how can there be an implied reservation of a right inconsistent with the terms in which the contract is expressed?

Was it not the intention of the State of Virginia to destroy her coupons by this series of legislative acts? Fortunately we are not left to conjecture or argument on this subject. Her Legislature has made two solemn declarations of its intention to do this. The Legislature which assembled in the fall of 1883 had hardly taken its seat before it enacted the following joint resolution, to be found at p. 7, acts 1883–'84:

"The questions of the ascertainment and settlement of the
16 debt of the State having for thirteen years profoundly agitated the people of Virginia, persistent, repeated, and earnest, but unavailing, efforts having been made by a large body of the citizens and tax-payers of the State to effect and carry out a settlement of this debt under which a much larger sum would have been recognized and assumed by the State than has been assumed by the act approved February 14th, 1882, popularly called the 'Riddleberger bill,' resulting in political contests which have convulsed the popular mind, given repeated and ruinous shocks to the business interests of the State, retarded the prosperity and threatened the safety of the people, and all of the issues involved in the final adjustment of this debt having, at length, in 1881 and 1882 and 1883, after years of discussion and controversy, been submitted to the arbitrament of the people and the courts, and the people having, after a thorough can-

vass of the questions of fact and of right involved, given their sanction at the polls to the measures, modes, and principles of settlement substantially involved in the 'Riddleberger bill,' and the highest courts of Virginia and of the United States having sanctioned
17 the validity and the constitutionality of the law designed to give effect to the adjustment thus enacted, and it being of imperative importance to the people of Virginia and essential to the security of the public creditors that this settlement shall be taken as a finality, and that further agitation and controversy shall cease: Therefore be it resolved by the General Assembly of Virginia—

"1. That the people of Virginia have accepted the act of February 14th, 1882, known as the 'Riddleberger Bill,' as the ultimate settlement of the debt of this State; that it is their unalterable purpose that that settlement shall be final, and that any expectations that any settlement of the debt of this State upon any other basis will ever be made or tolerated by the people of Virginia is absolutely illusory and hopeless.

"2. That the interests of the public creditors, as well as the safety and welfare of the State, require that this settlement shall be accepted by the creditors as well as by the State, and therefore the General Assembly of Virginia, on behalf of all the people of the State, hereby advise and call upon the holders of the bonds and claims against the Commonwealth to come forward with promptness, and fund the same under the provisions of the act of February 14, 1882."

18 By this it is declared to be the unalterable determination of the Legislature of Virginia to force the holders of the State's coupons to surrender them to the State, or to receive nothing whatever from them. The same thing is still more shamelessly declared in the preamble to the act already referred to, which provides that the coupon shall be charged up against the principal of the bond.

That preamble reads as follows:

"Whereas it is the intention of the General Assembly, so far as they have the power, to cause the basis of settlement provided in the act entitled An act to ascertain and declare Virginia's equitable share of the debt created before and actually existing at the time of the partition of her territory and resources, and to provide for the issuance of bonds covering the same, and the regular and prompt payment of interest thereon, approved February 14, 1882, to apply alike to all the holders of the bonds of the State; and whereas many holders of the bonds have not accepted the provisions of said act, by reason whereof it has been impossible to prevent coupons being paid into the treasury for taxes, the holders of the tax-receivable coupon bonds in that way enforcing the payment of a higher
19 rate of interest than is provided by the above-recited act—be it therefore enacted," &c.

Your petitioner is now in the custody of the said N. M. Lee, sergeant of the city of Richmond, under said indictment, and he is therefore restrained of his liberty in violation of the Constitution of the United States.

Your petitioner, therefore, prays that this honorable Court will award him a writ of *habeas corpus* directed to N. M. Lee, sergeant of the city of Richmond, Va.; commanding him to produce the body of your petitioner before this honorable Court, together with the cause of his detention, and that your petitioner may be discharged from his unlawful custody.

WM. L. ROYALL.

City of Richmond,
STATE OF VIRGINIA, } *To wit:*

This day William L. Royall personally appeared before me, a notary public in and for the city aforesaid, and made oath that the allegations of the foregoing petition are true.

Given under my hand, this 9th day of May, 1885.

WALTER CHRISTIAN, *N. P.*

20 And on the same day, to wit, at a circuit court of the United States for the eastern district of Virginia, held at Richmond, in said district, on the 29th day of May, A. D. 1885.

Ex Parte WM. L. ROYALL No. 2.

This day Wm. L. Royall presented his petition to the court, praying for a writ of *habeas corpus* to discharge him from a prosecution pending against him in the hustings court of the city of Richmond for bringing a suit upon tax-receivable coupons of the State of Virginia without having first paid the special attorney's license of $250 required by the act of Assembly of said State, but the court, being of opinion that it is without jurisdiction to discharge the petitioner from said prosecution, doth refuse to award said writ, and dismisses the petitioner's petition, with costs.

RO. W. HUGHES, *Judge.*

And now at this day, to wit, at a circuit court of the United States for the eastern district of Virginia, held at Richmond, in said district, on the 22d day of July, A. D. 1885.

21 *Ex Parte* WM. L. ROYALL No. 2.

This day the petitioner appeared, by counsel, in open court, and prayed an appeal to the Supreme Court of the United States from the judgment refusing him a writ of *habeas corpus* heretofore entered, which is allowed him upon his entering into bond, payable to the United States of America, in the penalty of $200, conditioned for the payment of all costs that may become due to the officers of the Supreme Court of the United States upon such appeal.

RO. W. HUGHES, *Judge.*

22 UNITED STATES OF AMERICA, *To wit:*

The President of the United States to the judges of the circuit court of the United Statis for the eastern district of Virginia, Greeting:

Because in the record and proceedings and also in the rendition of the judgment of a plea which is in the said court before you, on

the *ex parte* petition of William L. Royall for a writ of *habeas corpus* (No. 2), a manifest error hath happened, to the great damage of the said petitioner, as by complaint appears, we, being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington, in the said District, on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error which of right and according to the laws and customs of the United States should be done.

Witness the Honorable M. R. Waite, Chief Justice of the Supreme Court of the United States, this 22nd day of July, in the year of our Lord one thousand eight hundred and eighty-five.

[Seal United States Circuit Court, Eastern District of Virginia.]

M. F. PLEASANTS,
Clerk of the Circuit Court of the United States
for the Ea. District of Virginia.

23 [Endorsed:] No. 2. United States circuit court, east. district of Virginia. *Ex Parte* Wm. L. Royall. Writ of error. Filed July 22d, 1885. M. F. Pleasants, clerk.

24 Circuit Court of the United States of America for the Eastern District of Virginia.

Ex Parte WM. L. ROYALL No. 2.

Know all men by these presents that we, Wm. L. Royall and McLain Pleasants, are held and firmly bound unto the United States of America in the sum of two hundred dollars, to be paid to the said United States of America, heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 28th day of July, A. D. 1885.

Whereas the above-named Wm. L. Royall hath prosecuted an appeal to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the circuit court of the United States for the eastern district of Virginia:

Now, therefore, the condition of this obligation is such that if the above-named Wm. L. Royall shall prosecute his said appeal to effect, and answer all damages and costs if he shall fail to make good his

plea, then this obligation shall be void ; otherwise the same shall be and remain in full force and virtue.

WM. L. ROYALL. [SEAL.]
McLAIN PLEASANTS. [SEAL.]

Sealed and delivered in presence of—
M. F. PLEASANTS, *Clerk.*

25 *Assignment of Error.*

Circuit Court of the United States for the Eastern District of Virginia.

Ex Parte WM. L. ROYALL.

On petition for a writ of *habeas corpus* No. 2.

The appellant assigns for error the refusal of the court to award him a writ of *habeas corpus.*

July 28th, 1885.

WM. L. ROYALL.

UNITED STATES OF AMERICA, *Eastern District of Virginia,* } *ss:*

I, M. F. Pleasants, clerk of the circuit court of the United States for the eastern district of Virginia, hereby certify that the foregoing is a true and complete transcript of the record and proceedings in the above-entitled cause as the same remains on the files of my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Richmond, in said district, this 28th day of July, A. D. 1885.

[Seal United States Circuit Court, Eastern District of Virginia.]

M. F. PLEASANTS, *Clerk.*

Endorsed on cover: E. Virginia. C. C. U. S. No. 975. *Ex parte* William L. Royall No. 2, appellant & pl'ff in error. Filed September 25, 1885.

117-247-254

SUPREME COURT OF THE UNITED STATES.

EX PARTE WM. L. ROYALL.

On Motion for Writ of Habeas Corpus.

SUPREME COURT OF THE UNITED STATES.

EX PARTE WM. L. ROYALL.

On Motion for Writ of Habeas Corpus.

BRIEF OF WM. L. ROYALL FOR THE MOTION.

On the 3d of November the court directed two questions to be argued, after notice to the Attorney-General of Virginia. On the 10th day of November the Attorney-General was notified that these questions would be called up for argument on Monday, December 1st, and proof of service is filed with the clerk.

The questions stated are:

1. Whether the Hustings Court of the city of Richmond is the highest court of the State in which there can be a decision under the indictment in this case upon the question whether the statute for the violation of which the petitioner is held in custody, is in contravention of the Constitution of the United States.

2. Whether this court has jurisdiction to issue a writ of *habeas corpus* to inquire into the cause of detention of a person held in custody of a State court for trial and before his trial, if he is held in violation of the Constitution or of a law or a treaty of the United States.

To the first question, the answer must be at once given that it is not. The accused can certainly appeal, if he be convicted, to the Supreme Court of Appeals, which has jurisdiction to reverse the judgment. V. C. 1873, page 1251, section 3.

The second question divides itself into two questions:

a. Has Congress the power under the Constitution to confer the jurisdiction on this court.

b. If it has, has it exercised the power.

a. Has Congress the power?

If the case be one that arises under the Constitution, there can be no question of the power of Congress, for the Constitution extends the judicial power to all cases arising under the Constitution.

Is this case one that arises under the Constitution?

Let us get a precise and definite idea of the meaning of these words, "arising under the Constitution."

A case arises under the Constitution, if it be necessary to construe the Constitution in that case in order to give judgment in it. This has been the settled meaning of this language ever since the case of Cohen *v.* Virginia; *Ib.* 6 Wheaton, p. 379; Osborne *v.* The Bank, 9 Wheat. 822; Gold-Washing Company *v.* Keyes, 96 U. S. R. 201; R. R. Co. *v.* Mississippi, 102 U. S. 141; Smith *v.* Greenhow, 109 U. S., p. 669.

Now, it may be objected to this, that under this construction every possible case may be brought into the Federal courts, if the plaintiff avers that his right arises under the Constitution, and that it will be necessary for the court to construe the Constitution in order to give judgment in the case; but the difficulty suggested is one that is apparent only, and not real. The distinction lies just here: If, on looking into the record, the court perceives that the plaintiff's right does not depend upon the Constitution, then it dismisses the case for want of jurisdiction, and refuses to pass judgment on the merits, which leaves the plaintiff to pay his costs for foolishly bringing his case into a Federal court; but if, on looking into the record, the court perceives that the right asserted really does depend upon the Constitution, then it retains the cause and gives judgment on the merits.

Does the petitioner's allegation that he is about to be tried under a law which is contrary to the Constitution of the United States, make a case which arises under the Constitution? Unquestionably it does, for it is necessary to construe the Constitution in order to give judgment upon the petitioner's allegation, which brings his case precisely within the definition. Now, when the record is looked into, if it be seen that the petitioner's allegation is not true—that is, if the case is not one arising under the Constitution—then the court will refuse to take jurisdiction of the case; but if it be seen that the law is one forbidden by the Constitution, then the court will take jurisdiction of the case, and will discharge the prisoner from custody. Let this reasoning be tested. Unquestionably this case could be brought here after judgment in the highest court of the State upon a writ of error. Why should not the power be so construed as to authorize Congress to provide for bringing it here through a collateral proceeding before judgment? Let it be considered in respect to the Constitution itself. Why should the judicial clause of the Constitution be so narrowed by construction as to deny Congress this power? Why, rather, should it not be so construed as to confer the largest possible power upon Congress in order that Congress may effectually secure obedience to the Constitution in all of its provisions? Now, if it be said that it does not comport with the dignity of a sovereign State that her tribunals should be invaded by a foreign jurisdiction, indirectly and collaterally, the reply is obvious that it is not inconsistent with her dignity for this tribunal—the supreme judicial tribunal of this nation, to which States as well as individuals must bow—simply to make inquiry whether she has violated that Constitution which she has pledged herself to be bound by. And if this tribunal perceives upon that enquiry that she has not violated the Constitution, it refuses to inter-

fere with her or her officers. There is in this simple enquiry nothing that is inconsistent with the State's dignity, but if it be found upon the enquiry that she has deliberately attempted to enforce a statute which the Constitution forbids her to enact or to enforce, then her plea of sovereignty and dignity is entitled to no respect whatever.

Now may not the prisoner demand as a matter of justice that he shall be taken from the custody of the State by the speediest process possible, if she is holding him in custody by an authority which the Constitution forbids her to exercise? What justice is there in compelling him to lie in jail and be subjected to the harassment and distress of a protracted trial, with its appeal to the highest court of the State, and appeal thence here, if this court, at the end, is to declare that there never was one moment of time when the State had the slightest authority for arresting or holding him in jail? This reasoning is all completely sustained by the decisions which this court has made in the case of Coleman *v.* Tennessee, 97 U. S. 509.

The facts were these: Coleman, being a soldier in the army of the United States located in Tennessee, committed a murder whilst the State of Tennessee was occupied by the United States army in the year 1863; this was an offence against an act of Congress, under which Coleman was tried by court-martial and sentenced to be executed. The sentence was regularly approved by all successive grades up to the President and by the President also. For some reason which the record does not disclose, the sentence was never carried into effect. After the war, in the year 1876, Coleman, being found in the State of Tennessee, was arrested and prosecuted for this murder before a court of the State of Tennessee. He pleaded to this prosecution a former conviction, insisting that the Constitution and laws of the United States forbade him to be put in jeopardy again.

The lower court refused to give any value to his plea, whereupon he was tried, found guilty, and sentenced to be executed. He appealed to the Supreme Court of the State. Whilst his appeal was pending in that court, he applied to the Circuit Court of the United States for that district for a writ of *habeas corpus*, which ordered his discharge from the custody of the State authorities upon the ground that he was held in violation of the Constitution and laws of the United States. Upon this order being presented to the Supreme Court of Tennessee, it refused to show any respect for it, holding that the Circuit Court was without jurisdiction to make it.

The proper proceeding then for Coleman would have seemed to be to apply to the Circuit Court to have its order enforced, but for reasons best known to him, he did not take that course, but upon the Supreme Court of Tennessee affirming the judgment of the lower State court, he appealed to this court from both the judgment and the order refusing respect to the writ of *habeas corpus*.

When this court came to consider the case it was confronted with two questions:

1st. Whether the State court had erred in refusing to sustain his plea.

2d. Whether it should have respected the Circuit Court's writ of *habeas corpus*.

This court held that the court erred upon the first point, and it reversed its judgment for that reason.

This made it unnecessary to pass upon the second question; but in respect to it the court used the following language at page 519:

"This conclusion renders it unnecessary to consider the question presented as to the effect to be given to the order of the Circuit Court of the United States directing the discharge of the defendant. It is sufficient to observe that, by the act of February 5, 1867, the several courts of the United States, and their respective judges, in their respective jurisdictions, have, in addition to the authority previously conferred, power to grant writs of *habeas corpus* in all cases upon petition of any person restrained of his liberty in violation of the Constitution or of any law of the United States; and if it appear, on the hearing had upon the return of the writ, that the petitioner is thus restrained, he must be forthwith discharged and set at liberty."

Whilst this may be said to be *dicta*, it may nevertheless be said to be a statement of the opinion of the court, that the Circuit Court had the power to release the prisoner by *habeas corpus*.

The court has on two other occasions declared that the power exists, to wit:

Ex parte Siebold, 100 U. S. 371, and *ex parte* Yarborough, 110 U. S. 651.

In these two cases the right to discharge the prisoner by *habeas corpus* is placed upon the ground that if the law under which the prisoner is being prosecuted in the State court is an unconstitutional law, the State court is wholly without jurisdiction of the matter, and is therefore holding the prisoner without any semblance of authority, when the Constitution guarantees to him that in that matter he shall not be held in custody.

In *ex parte* Siebold, at page 376, the court uses this language: "Without attempting to decide how far this case may be regarded as law for the guidance of this court, we are clearly of opinion that the question raised in the case before us is proper for consideration on *habeas corpus*.

"The validity of the judgment is assailed on the ground that the acts of Congress under which the indictments were found are unconstitutional. If this position is well taken, it affects the foundation of the whole proceedings. An unconstitutional law is void, and is as no law, and an offence created by it is not a crime, and conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment.

"It is true that if no writ of error lies, the judgment may be final in the sense that there may be no means of reversing it, but personal liberty is of so great moment in the eye of the law, that the judgment of an inferior court affecting it, is not deemed so conclusive, but that, as we have seen, the question of the court's authority to try and imprison a party may be reviewed on *habeas corpus* by a superior court, or judge having authority to award the writ.

"We are satisfied that the present is one of the cases in which this court is authorized to take such jurisdiction. We think so because if

the laws are unconstitutional and void, the Circuit Court acquired no jurisdiction of the cause; its authority to indict and try petitioners arose solely upon these laws."

In *ex parte* Yarborough, 110 U. S. 651 the court says at p. 654:

"This, however, leaves for consideration the more important question—the one mainly relied on by counsel for petitioners—whether the law of Congress as found in the revised statutes of the United States, under which the prisoners are held, is warranted by the Constitution, or, being without such warrant, is null and void.

"If the law which defines the offence and prescribes its punishment is void, the court was without jurisdiction, and the prisoners must be discharged."

It is very clear, therefore, both upon principle and upon authority, that the Constitution confers upon Congress power to clothe this court with jurisdiction to take a prisoner from the custody of a State court, if he is being prosecuted in that State court under a law which the Constitution of the United States forbids the State to enact.

b. This brings us to the remaining question: Has Congress exercised this power and clothed this court with that jurisdiction? And upon that question there is very little to be said. The act of 1867 authorizes this court to discharge a prisoner from the custody of the State court whenever he is held in that custody "*in violation of the Constitution.*" If he is held by the State court under the authority of a State statute which the Constitution forbids the State to enact, then, unless the word "violation" has changed the meaning which it has always heretofore borne, he is certainly held "*in violation* of the Constitution."

I shall regard it as a useless waste of the time of the court to discuss this matter any further.

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Supreme Court of the United States.

Ex-parte Wm. L. Royall, No. 2.

On Motion for Writ of Habeas Corpus.

Supplemental Brief of Wm. L. Royall for the motion filed by leave of Court.

The discussion of the question propounded by the Court starts with one proposition fixed and clearly defined—that if Congress *can* clothe this Court with jurisdiction to take a prisoner out of the custody of a State Court before judgment by *habeas corpus*, where he is held in contravention of the Constitution, it has done so. Words could not be broader than those used by the act. Wherever a person is held in custody "in violation" of the Constitution, this Court is given what power Congress can confer upon it to release him, and if he be held under the authority of a State law which the Constitution forbids that State to enact or enforce, he must certainly

be deemed to be held in "violation of the Constitution."

Moreover, the act makes no distinction between the case of a person held in violation of the Constitution after judgment, and one held in violation of the Constitution before judgment. It intends that that this Court shall release him if he be held in violation of the Constitution, never mind at what stage of the proceedings against him, the fact that he is held in violation of the Constitution may appear.

The sole and entire question, therefore, is, can Congress confer the jurisdiction on this Court.

There can be no question of the inability of Congress to confer the jurisdiction on this Court as original jurisdiction. It can have orignal jurisdiction in but two cases—to wit, a case in which a State is party, and a case in which some diplomatic officer is a party, and Congress can give it no original jurisdiction in any other cases.

Marbury vs. *Madison*.

But Congress can certainly confer power upon it to revise any action of any United States Court and any action of any State Court if the action of the State Court be in a case arising under the Constitution, laws or treaties of the United States.

Now, revisory proceedings may be by way of *habeas corpus*, as well as by way of writ of error, and if the *habeas corpus* proceedings provided for be that this Court may revise the proceedings of a

United States Court, the jurisdiction is effective, and if they be aimed at authorizing this Court to revise the proceedings of a State Court in a case arising under the Constitution, laws or treaties of the United States, they are equally effective.

These propositions, so far as reviewing the proceedings of the Circuit Courts of the United States is concerned, are now too elementary in this Court to bear discussion. The Court has time and time again reviewed the final judgments of the Circuit Courts on writs of *habeas corpus*, and in *ex parte* Virginia 100, U. S. R., it determined that it could review the very first step that a United States Court took by writ of *habeas corpus*. In that case, proceedings had gone no further than the indictment of the prisoner and his arrest upon the bench warrant of the Court, but this Court held that the bench warrant ordered was action by the Court itself, and that that action was as much subject to review and reversal as any other action.

Now, Congress must have power to clothe this Court with the same control over the action of a State Court in a case arising under the Constitution, laws or treaties of the United States, as it has to clothe it with control over the proceedings of a United States Court; for there are not two provisions of the Constitution, one giving Congress power to clothe this Court with revisory jurisdiction in the case of United States Courts, and another giving Congress power to clothe it with revisory jurisdiction in the case of State Courts. But the entire

power of Congress comes from one provision. It may empower this Court to revise any proceedings of any United States Court; (but United States Courts cannot take proceedings in any other than cases arising under the Constitution, laws or treaties of the United States), and it may empower it to revise any proceedings of a State Court in any case arising under the Constitution, laws or treaties of the United States.

Then, if this Court had jurisdiction in *ex parte* Virginia to review the action of the Circuit Court in ordering a bench warrant, why has it not jurisdiction to review the action of the Husting's Court in ordering a capias for the petitioner's arrest? A certified copy of the record of *ex parte* Royall's case, as far as it has proceeded in the Husting's Court is filed with the petition. By inspecting that record it will be seen that the petitioner was arrested upon a capias ordered by the Court. What is the difference between that order of the Husting's Court and the order of the Circuit Court in *ex parte* Virginia, directing a bench warrant? Each is action by the Court, and Congress may empower this Court to review any action whatever of a court in a case arising under the Constitution, &c.

It cannot be truly affirmed that final judgments are, in their nature, the only actions of courts that appellate proceedings properly address themselves to. It is as common to all systems of jurisprudence to review and reverse interlocutory orders by appellate proceedings as it is to review final judgments. In the practice of New York, there are ten interlocutory

orders appealed from, where there is one final judgment appealed from. The functions of appellate proceedings is to review any action whatever of a court—whether it be the first step taken or the last.

There can be no doubt that Congress may authorize the inferior United States Courts to discharge this petitioner by *habeas corpus*.

Is it to be said that the inferior United States Courts may have this jurisdiction conferred upon them, but that the same jurisdiction—the most important in its nature that can be vested in any court—cannot be given to this Court? If it be so, it would argue some strange oversight in the framers of the Constitution. Upon this subject Chief Justice CHASE, speaking for the Court, in *ex-parte Yerger*, 8 Wall., at page 96, says:

> "That this Court is one of the courts to which the power to issue writs of *habeas corpus* is expressly given by the terms of this section, has never been questioned.
>
> "It would have been, indeed, a remarkable anomoly if this Court, ordained by the Constitution for the exercise, in the United States, of the most important powers in civil cases of all the highest courts of England, had been denied, under a Constitution which absolutely prohibits the suspension of the writ, except under extraordinary exigencies, that power in cases of alleged unlawful restraint which the *habeas corpus* act of Charles 2d expressly deciares those courts to possess."

Mr. Justice MILLER asked Gov. Chamberlain if the fact that Congress had made provision for bring-

ing cases in which a prisoner is held in violation of the Constitution here by writ of error is not evidence that the *habeas corpus* act is not to apply to their cases, but that they are to be left to the remedy by writ of error.

I submit that this would be a very forced construction of the *habeas corpus* act. It would be importing into the act what is not in it, and what every consideration that bears on the subject shows could not have been intended to be in it. The act as it appears in the Revised Statutes, so far as it gives the United States Court authority to discharge persons held in violation of the Constitution was passed in 1867, when the state of affairs in the Southern States made the country and Congress believe that certain classes of persons were habitually arrested and held in the custody of the State courts for matters that the Constitution and laws of the United States forbade the States to prosecute them for. The *habeas corpus* act, as it how stands, was passed for the benefit of these persons. Its leading intent was that they should be speedily discharged from their unlawful imprisonment, rather than that they should be compelled to undergo a trial that the Constitution guaranteed to them that they should not be subjected to. The very purpose of the act was to discharge such persons by its machinery, rather than compel them to seek their discharge through the tedious proceedings of a writ of error.

WM. L. ROYALL.

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SUPREME COURT OF THE UNITED STATES.

EX PARTE WM. L. ROYALL.

No. 2.

Petition for Writ of Habeas Corpus.

SUPREME COURT OF THE UNITED STATES.

EX PARTE WM. L. ROYALL.

No. 2.

To the Honorable Justices of the Supreme Court of the United States:

Your petitioner, William L. Royall, would respectfully show that under the provisions of an act of the General Assembly of the State of Virginia approved March 30th, 1871, entitled "An Act to Provide for the Funding and Payment of the Public Debt," the State of Virginia issued her certain bonds, with interest-coupons thereto attached, which coupons bore upon their faces the contract of the State of Virginia that they should be received in payment of all taxes, debts, and demands due to said State. That by the provisions of another act of her General Assembly, approved January 14th, 1882, it is enacted that her officers shall not receive said coupons in payment of taxes due to her until judgment has been rendered in a suit brought on said coupons, according to proceedings provided for in said act. That the validity of this last-mentioned act was assailed in the Supreme Court of the United States in the case of Antoni *v.* Greenhow, reported in the 107th volume of the Reports of the Decisions of the Supreme Court, and its validity sustained upon the ground that said act furnished tax-payers with a sufficient remedy to enforce said contract. That by the provisions of the 90th and 91st sections of chapter 450 of the laws of Virginia for the year 1883–'84, it is provided that attorneys at law who have been licensed to practice law less than five years shall pay a license tax of fifteen dollars, and those who have been licensed more than five years, twenty-five dollars. That such revenue license shall entitle the attorney paying it, to practice law in all the courts of said State. That it is further provided by said 91st section that no attorney shall bring any suit on said coupons, under said act of January 14th, 1882, unless he pay, in addition to the above-mentioned license-tax, a further special license-tax of two hundred and fifty dollars. That your petitioner has been licensed to practice law more than five years, and that in the month of April, 1884, he paid to said State twenty-five dollars, and received from her a revenue license to practice law in all the courts of said State, but that he has not paid the additional special license-tax of two hundred and fifty dollars provided for in said 91st section. That under the employment of a cli-

ent who had tendered coupons issued by said State under said act of March 30th, 1871, to the treasurer of Richmond city in payment of his taxes, which coupons had been received by said treasurer for identification and verification and certified to the Hustings Court of the city of Richmond, and thereafter had paid his tax in money, he brought a suit under said act of January 14th, 1882, to recover said money back after proving the genuineness of said coupons. That the grand jury of the city of Richmond thereupon found an indictment against your petitioner for bringing such suit without having paid said special license-tax. That he brought said suit after he had paid his license tax above mentioned and while he had a license to practice law until April, 1885. That he was thereupon arrested by order of the Hustings Court of the city of Richmond and committed to the custody of N. M. Lee, sergeant of said city; and that he is about to be tried and punished under said indictment. That said act, which requires him to pay said special license-tax in addition to his general license-tax, is repugnant to Section 10 of Article 1 of the Constitution of the United States, and is therefore null and void, and the act providing for punishing your petitioner for not paying said special license-tax is likewise repugnant to said Constitution.

Your petitioner would respectfully show the following grounds upon which the said acts are repugnant to the Constitution of the United States. When the State of Virginia enacted said act of March 30th, 1871, she desired to free herself from one third of her debt, which she thought that the State of West Virginia equitably owed. She therefore offered to her creditors that if they would release her from one third of their claims, she would give them new bonds, with interest-coupons attached, receivable for taxes. In other words, she promised that she would pay the holder of a $1,000 bond sixty dollars a year in semi-annual instalments, and that if she did not, he, if he were a tax-payer, might pay his taxes with the coupons, and if he were not a tax-payer, that he might sell them to a tax-payer who might pay his taxes with them. Now, the agreement that the coupons should be received from the bearer of them in payment of any taxes that bearer might owe the State, was the consideration which moved the creditor to releasing the State from said third of his demand, and the new contract necessarily, *ex vi termini*, carried with it, as an incident, the right to employ the services of those who were skilled in conducting proceedings in the courts, in case the holder of the coupon was required to resort to the provision making it receivable for taxes, to make it available. The coupons were not issued exclusively to those skilled in legal procedure. They are offered indiscriminately to any and all persons who may happen to be creditors of Virginia, whether they be lawyers or whether they be laymen. The court must surely take judicial notice of the fact that those who are unskilled in legal procedure are incapable of conducting for themselves the litigation demanded by the act of January 14th, 1882.

It is so perfectly well understood that a layman is incompetent to conduct proceedings in a court, that the very rules of this honorable court forbid any but persons who have had long experience to appear at its bar, and the laws of the State of Virginia forbid any but

skilled and licensed persons to conduct causes in her courts. It is a matter of such universal knowledge that none but skilled persons can conduct the litigation provided for in the act of January 14th, that it must be held that when the State put out the coupon she agreed, as part of her contract, that if she did not pay her interest and then compelled the coupon holder to resort to her courts to make the coupon available as a tax-paying instrument, that he should have the right to avail himself of the services of those who understood the methods of conducting a cause in court through its various stages. It would be nonsense to say that the State reserved to herself the right to force the coupon holder into a law-suit before he could make his coupon available, but also reserved the right to exclude him from the services of a lawyer to conduct his law-suit. It is too clear for argument that the contract carried with it as an incident, the right to employ an attorney to conduct the law-suit, if the State forced a law-suit upon the holder as a condition to his making it available.

Now, if the State reserved a right to make an attorney pay a license tax before he should be permitted to conduct the suit which she forces the coupon holder to bring, then her contract that she will receive the coupon for taxes is utterly valueless, for if she can make him pay a tax of one cent, she can make him pay a tax of one million of dollars; and all that she need do to rid herself of her contract is to forbid her officers to receive the coupons and then to tax the lawyers so heavily for bringing suits upon them as to make it impossible for them to bring suits.

Let it be distinctly understood that the question of the tax is not one of degree. By no means. It is not intended that the imposition of this tax is void because it is so onerous as to be unreasonable. The proposition maintained is, that the State cannot impose a tax of one cent, because she contracted that the holder of the coupon might have all the ordinary means for enforcing a reception of his coupon in case she refused to receive it, and if she may burden the resort to those means by taxing that resort one cent, she may so burden them as to make a resort to them impossible. The proposition contended for is that she contracted that she would not tax the lawyer who brought coupon suits, and that it would be a violation of her contract for her now to tax him. She may, undoubtedly, tax a lawyer by a license tax for exercising his profession of lawyer. The limit to which such power of taxation may go is the limit of what is reasonable. The law protects the farmer in tilling his fields and tending his flocks. The farmer's fields and flocks must, therefore, bear their portion of the burdens which the maintenance of government require. So the law protects the lawyer and the doctor in the exercise of their callings, and each must contribute his ratable proportion of the costs of sustaining the law. The State cannot forbid the lawyer or the doctor to practice his profession, nor can she impose such a burden upon either as would amount to prohibition. All she can do is to make each give up such a proportion of what he earns under the protection of the law as bears a just proportion, as nearly as can be estimated, to what the farmer pays on his land and cattle.

Now, the State may, undoubtedly, tax the lawyer for exercising his call-

ing as a lawyer, and because he adds to the general business of a lawyer the particular business of bringing coupon suits under the act of January 14th, he cannot therefore claim exemption from taxation. But if he will forego all other law business, and confine himself exclusively to the business of bringing suits under the act of January 14th, 1882, then it is insisted that he may do that business without paying one cent's license tax; because, if the State can make him pay one cent, she can charge him what she chooses, and thus disable the coupon holder to make any use whatever of his coupon. It is her contract which disables her to make the charge.

Neither the act complained of in this proceeding nor any other one of those complained of at the same time in this court, should be considered separately and to itself. Taken all together, they form a series of acts passed by the Virginia Legislature at various intervals, beginning in January, 1882, all aimed at the same end. As they are all acts *in pari materia*, they are all to be considered together as forming separate sections of one act, and they are all so intimately connected together that if it should be found that all together impair the obligation of the State's contract, then all must fall together.

Now, let it be observed that the coupon contains two contracts—one, that the State will, on the first day of January or July, as the case may be, pay the bearer thirty dollars; the other, that if she do not, the bearer may pay her what he owes her with the coupon. If she observes her first promise and pays the coupon, no controversy can possibly arise in respect to the second. It is only when she deliberately repudiates her first engagement, that the second can come under discussion. Now, she has deliberately repudiated her first promise. The 15th section of her act of February 14th, 1882, providing for funding her debt anew, forbids her officers to pay interest upon any bond except such as may be issued under the provisions of that act. The coupon holder is thus forced to resort to the subsidiary promise or else abandon his coupon. When we look to the legislation that she has adopted, that bears upon this subsidiary contract, the first thing that strikes the attention is the provision of the act of January 26th, 1882, (Acts 1881–'2, p. 37,) and that of the act of January 14th, 1882, (Ib., p. 10,) which forbid the tax collector to receive coupons for taxes until the end of a vexatious and harassing law-suit. If these acts stood alone, the coupon holder could make no complaint of them since the decision of this court in the case of Antoni *v.* Greenhow. But when that case was decided, they stood alone—what they do not do now, and since they have been subsequently supplemented by other legislation which did not exist when Antoni *v.* Greenhow was decided, it is insisted that they may now be referred to as constituting part of one general plan which had not been unfolded at that time, the full development of which completely annihilates the coupon.

What are the subsequent and additional acts?

1st. The first section of chapter 540, Acts 1883–'84, p. 721, provides that the Second Auditor shall open an account against each bond, and whenever a coupon from that bond comes into the treasury, he shall credit the bond with what would have been paid to it as interest if it had been surrendered and a new one taken at the rate of fifty-three cents on the

dollar, bearing three per cent. interest, and the residue of that coupon shall be charged against the principal of the bond and deducted from that principal at the bond's maturity. This is, of course, intended to scare the bondholder into surrendering his bond and taking the new bond, which is really for but one fourth of the old one.

2d. By the provisions of chapters 83, 153, and 450, pp. 120, 189, and 561, Acts 1883–'84, the payment of any license tax in coupons is absolutely prohibited under any conditions whatever. It is enacted by those statutes that license taxes shall be payable in gold, silver, and current paper-money only. Thus it is attempted to exempt one quarter of the State's revenues wholly and entirely from the operation of the coupons. This leaves nothing but the direct taxes on real and personal property for the coupons to affect.

3d. By the 65th section of chapter 450, Acts 1883–'84, p. 590, all persons are forbidden under penalties to sell the State's coupons to her tax-payers until they have first paid her a special license-tax for the privilege, of $1,000, and in addition thereto, the seller is required to pay her twenty per cent. of the face-value of the coupon sold. This is almost prohibition to selling the coupons. But it is absolute prohibition in theory, since she may make the tax more than the coupon, if she can make it anything. As the tax-payer is one person and the owner of the coupon another, it is difficult to understand how he is to get coupons with which to pay his taxes under this law.

4th. The State refuses to pay the coupon; she forbids her officers to receive it for taxes until a complicated law-suit has been ended; she thus forces a law-suit on the coupon holder, and then requires his attorney to pay her a special license-tax of $250 for the privilege of bringing the suit which she forces on the tax-payer. In other words, she claims the right to deprive him of the aid of a lawyer in the law-suit which she forces on him.

5th. Chapter 397, Acts 1883–84, p. 504, makes it the duty of the attorney for the Commonwealth in each county to defend every suit brought on coupons under either the act of January 14th, 1882, or that of January 26, 1882, whether there be any defence or whether there be not; and if the decision of the case is against the State, it is made his duty to take an appeal, whether there be any grounds for an appeal or whether there be not. With the thousands of appeals thus forced into the Court of Appeals, how is it possible to make the remedies provided for, available? It would take a century to hear all the appeals which the suits of one year would bring up.

6th. If the tax-payer, discouraged by these impediments, determine that he will abandon all hope of actually paying his taxes with his coupon, and stand upon his tender of it, thus using it as a barrier between the State and himself, he finds his situation no better. The act of January 26, 1882, p. 37, 38, forbids any court to grant him an injunction to restrain the State's officers from seizing his property for his tax, although he has tendered her coupons in payment of it; and the 3d section of chapter 421, Acts 1883–'84, p. 527, forbids him to sue the officer for his trespass in seizing his property after he has tendered him coupons in payment of his tax. He therefore has no redress whatever.

Thus the owner of one of the State's coupons is absolutely boycotted, so far as it is within the power of the Legislature of Virginia to boycott him. Of all persons in the world, he is the only one who can claim no protection from the law, and the law places him absolutely outside of its pale. On what principle can it be shown to be a crime, so very heinous in its nature, for one of Virginia's tax-payers to own one of her coupons?

Suppose that when the State of Virginia, in 1871, was begging her creditors to release her from one third of her debt, and take this tax-paying property of the new coupon as compensation for the release, she had told them that she reserved in her arsenal all these weapons to discharge at them when it suited her convenience so to do: how many of her bonds would have been surrendered to her? Is not the fact that she expressly reserved no right to enact this hostile legislation complete proof that she agreed with the creditor that she would enact no legislation hostile to the tax-paying quality of his coupon? Is not all this legislation inconsistent with the terms of the contract? And how can there be an implied reservation of a right inconsistent with the terms in which the contract is expressed?

Was it not the intention of the State of Virginia to destroy her coupons by this series of legislative acts? Fortunately, we are not left to conjecture or argument on this subject. Her Legislature has made two solemn declarations of its intention to do this. The Legislature which assembled in the fall of 1883 had hardly taken its seat before it enacted the following joint resolution, to be found at p. 7, Acts 1883–'84:

"The questions of the ascertainment and settlement of the debt of the State having for thirteen years profoundly agitated the people of Virginia, persistent, repeated, and earnest, but unavailing efforts having been made by a large body of the citizens and tax-payers of the State to effect and carry out a settlement of this debt under which a much larger sum would have been recognized and assumed by the State than has been assumed by the act approved February 14th, 1882, popularly called the 'Riddleberger Bill,' resulting in political contests which have convulsed the popular mind, given repeated and ruinous shocks to the business interests of the State, retarded the prosperity and threatened the safety of the people, and all of the issues involved in the final adjustment of this debt having at length, in 1881, and 1882, and 1883, after years of discussion and controversy, been submitted to the arbitrament of the people and the courts, and the people having, after a thorough canvass of the questions of fact and of right involved, given their sanction at the polls to the measures, modes, and principles of settlement substantially involved in the 'Riddleberger Bill,' and the highest courts of Virginia and of the United States having sanctioned the validity and the constitutionality of the law designed to give effect to the adjustment thus enacted; and it being of imperative importance to the people of Virginia, and essential to the security of the public creditors, that this settlement shall be taken as a finality, and that further agitation and controversy shall cease; therefore be it resolved by the General Assembly of Virginia—

"1. That the people of Virginia have accepted the act of February 14th, 1882, known as the 'Riddleberger Bill,' as the ultimate settlement of

the debt of this State; that it is their unalterable purpose that that settlement shall be final, and that any expectations that any settlement of the debt of this State upon any other basis will ever be made or tolerated by the people of Virginia, is absolutely illusory and hopeless.

"2. That the interests of the public creditors, as well as the safety and welfare of the State, require that this settlement shall be accepted by the creditors as well as by the State, and therefore the General Assembly of Virginia, on behalf of all the people of the State, hereby advise and call upon the holders of the bonds and claims against the Commonwealth to come forward with promptness, and fund the same under the provisions of the act of February 14, 1882."

By this it is declared to be the unalterable determination of the Legislature of Virginia to force the holders of the State's coupons to surrender them to the State, or to receive nothing whatever from them. The same thing is still more shamelessly declared in the preamble to the act already referred to which provides that the coupon shall be charged up against the principal of the bond.

That preamble reads as follows:

"*Whereas it is the intention of the General Assembly, so far as they have the power, to cause the basis of settlement provided in the act entitled An Act to ascertain and declare Virginia's equitable share of the debt created before and actually existing at the time of the partition of her territory and resources, and to provide for the issuance of bonds covering the same, and the regular and prompt payment of interest thereon, approved February* 14, 1882, *to apply alike to all the holders of the bonds of the State;* and whereas many holders of the bonds have not accepted the provisions of said act, *by reason whereof it has been impossible to prevent coupons being paid into the treasury for taxes,* the holders of the tax-receivable coupon bonds in that way enforcing the payment of a higher rate of interest than is provided by the above-recited act, Be it therefore enacted," &c.

Your petitioner is now in the custody of the said N. M. Lee, sergeant of the city of Richmond, under said indictment, and he is therefore restrained of his liberty, in violation of the Constitution of the United States.

Your petitioner, therefore, prays that this honorable court will award him a writ of *habeas corpus* directed to N. M. Lee, sergeant of the city of Richmond, Va., commanding him to produce the body of your petitioner before this honorable court, together with the cause of his detention, and that your petitioner may be discharged from his unlawful custody.

WM. L. ROYALL.

City of Richmond,
State of Virginia—to wit:

This day William L. Royall personally appeared before me, a notary public in and for the city aforesaid, and made oath that the allegations of the foregoing petition are true.

Given under my hand this day of , 1884.

N. P.

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Office Supreme Court U. S.
FILED
DEC 1 1884
JAMES H. MCKENNEY,
Clerk

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1884.

EX PARTE WILLIAM L. ROYALL, No. 2.

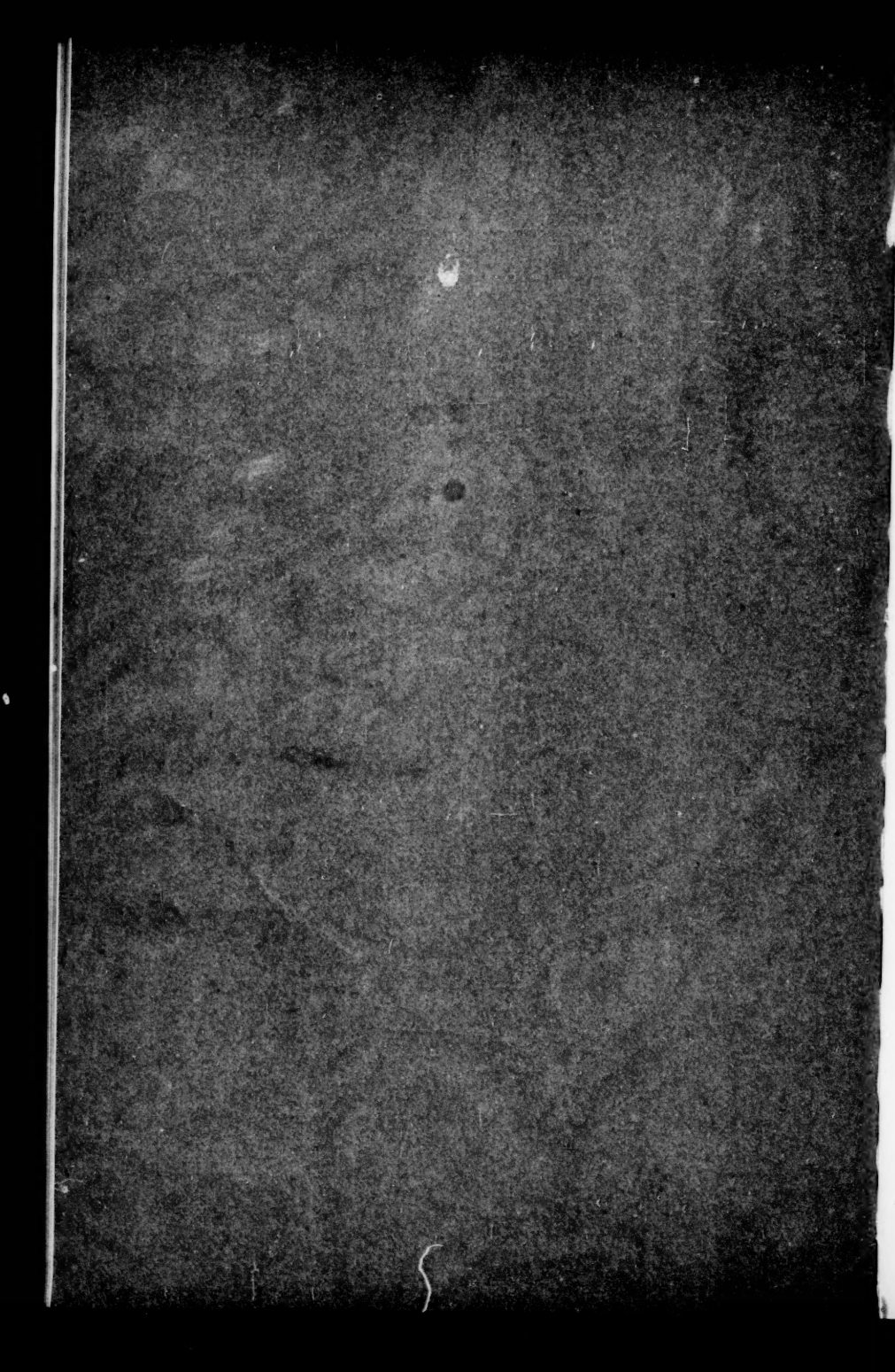
PETITION FOR WRIT OF HABEAS CORPUS.

ON MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF HABEAS CORPUS.

BRIEF FOR PETITIONER.

DANIEL H. CHAMBERLAIN,
WM. B. HORNBLOWER,
Of Counsel.

C. G. BURGOYNE, "Quick" Print, 146, 148 & 150 CENTRE ST., N. Y.



Supreme Court of the United States.

OCTOBER TERM, 1884.

Ex parte WILLIAM L. ROYALL, No. 2.

Petition for writ of Habeas Corpus.

ON MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF HABEAS CORPUS.

Statement of Case.

The petitioner, as appears by his petition presented to this Court, stands indicted in the Hustings Court of the City of Richmond. The facts leading to this indictment are shortly these: The State of Virginia has heretofore issued bonds of the State with interest coupons thereon made "receivable at and after maturity for all taxes, debts and demands due the State." Subsequently to the issue of such bonds and coupons the General Assembly of Virginia passed an Act by which, among other things, it was provided, in effect, that whenever any taxpayer shall tender any such coupons, the collector shall receive them and give a receipt therefor, stating that they are received for identification and verification; that the taxpayer shall thereupon be required to pay his tax in money; that the collector shall seal up the coupons so tendered and deliver them to the Judge of the County Court or Hustings Court of the City; that thereupon the taxpayer shall be at liberty to file his petition against the State, alleging the foregoing facts, and praying for a jury to try whether such coupons are valid or not; and if found valid, the collector is directed to refund the amount of the taxes so, as above, paid.

This Act further provided for similar proceedings by *mandamus*, at the suit of the taxpayer to compel the collector to receive coupons for taxes.

A subsequent act prohibited the Courts from issuing *mandamus* or any other summary process to compel the collector to receive coupons.

Antoni vs. Greenhow, 107 U. S., pp. 769, 771–774, 779.

The laws of Virginia for the year 1883–84, Chap. 450, sections 90 and 91, provide that attorneys at law who have been licensed to practice law more than five years shall pay a license tax of $25, which shall entitle them to practice *in all the Courts of the State;* but it is further provided in said 91st section that no attorney shall bring any suit on coupons of State bonds under said above-cited act, unless he shall have paid in addition to the above attorney's license, a further *special license tax of $250.*

The petitioner having been licensed to practice as an attorney more than five years, paid in April last, the license tax of $25. Thereupon, he brought suit for a tax-payer in the manner provided by the above statute of Virginia, against the State, to recover back the money paid for taxes, after the taxpayer had complied with the provisions of that statute. Thereupon, he was indicted in the Hustings Court of the City of Richmond, arrested and committed to the custody of the sergeant of that city, for trial.

Upon a motion heretofore made in this Court for leave to file a petition for a writ of *habeas corpus* on behalf of the petitioner, this Court in granting the motion proposed the following two questions for discussion by counsel.

I. "Whether the Hustings Court of Richmond is the highest Court of the State in which there can be a decision under the indictment in this case upon the question whether the statute for the violation of which petitioner is held in custody is in contravention of the Constitution of the United States?

II. "Whether this Court has jurisdiction to issue a writ of *habeas corpus* to inquire into the cause of the detention of a person held in the custody of a State Court for trial, and before his trial, if he is held in violation of the Constitution or of a law or a treaty of the United States."

The jurisdiction of this Court in *habeas corpus* is, of course, only such as has been conferred upon it by the Constitution and Acts of

Congress. The only provision of the Constitution respecting the writ of *habeas corpus* is the second clause of Section IX. of Article 1, in these words: "The privilege of the writ of *habeas corpus* shall not be suspended unless when in cases of rebellion or invasion, the public safety may require it."

The Judiciary Act of 1789, in its fourteenth section, provided:

"That all the before-mentioned Courts of the United States (District, Circuit and Supreme) shall have power to issue writs of *scire facias*, *habeas corpus* and other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law, and that either of the Justices of the Supreme Court as well as the Judges of the District Courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment, *provided* that writs of *habeas corpus* shall in no case extend to prisoners in gaol unless where they are in custody under or by color of the authority of the United States or are committed for trial before some Court of the same, or are necessary to be brought into Court to testify."

By the seventh section of the Act of March 2d, 1833 (4th. St. at Large, 634), it was provided that the same Judges and Justices,

"In addition to the authority already conferred by law shall have power to grant writs of *habeas corpus* in all cases of prisoners in gaol or confinement where they shall be committed or confined on or by any authority of law of the United States or any authority or law for any act done or omitted to be done in pursuance of a law of the United States, or any order, process or decree of any Judge or Court thereof, anything in any act of Congress to the contrary notwithstanding."

By the Act of August 29th, 1842, (5th. St. at Large, 539,) this power was further extended to issue the writ where the prisoner, being a subject or citizen of a foreign State and domiciled therein, "shall be committed or confined or in custody under or by any authority of law or process founded thereon, of the United States, or of any one of them, for or on account of any act done or omitted under any alleged right, title, authority, privilege, protection or exemption, set up or claimed under the commission or order or sanction of any foreign State or sovereignty, the validity and effect whereof depend upon the law of nations or under color thereof."

By the first section of the Act of February 5th, 1867 (14th. St. at Large, 385), it was provided:

"That the several Courts of the United States and the several Justices and Judges of such Courts within their respective jurisdictions, in addition to the authority already conferred by law, shall have power to grant writs of *habeas corpus* in all cases where any person may be restrained of his or her liberty in *violation of the Constitution or of any treaty or law of the United States.*" * * *

"From the final decision of any Judge, Justice or Court inferior to the Circuit Court, an appeal may be taken to the Circuit Court of the United States for the district in which said cause is heard, and from the judgment of said Circuit Court to the Supreme Court of the United States on said terms and under such regulations and orders, &c., as may be prescribed by the Supreme Court (Section 2). * * * This Act shall not apply to the case of any person who is or may be held in the custody of the military authorities of the United States charged with any military offense, or with having aided or abetted rebellion against the government of the United States prior to the passage of this Act."

The foregoing are the principal Acts of Congress establishing the jurisdiction of this Court as well as of the other Courts of the United States, in *habeas corpus*, and these provisions constitute substantially Chap. XIII. of the Revised Statutes of the United States, page 141, Title, *Habeas Corpus.*

The portions of the laws of Virginia to be considered in this case are as follows:

"1. *Be it enacted by the General Assembly of Virginia:* That whenever any taxpayer or his agent shall tender to any person whose duty it is to collect or receive taxes, debts, or demands due the Commonwealth, any papers or instruments in print, writing or engraving, purporting to be coupons detached from bonds of the Commonwealth, issued under the Act of eighteen hundred and seventy-one, entitled an Act to fund the public debt in payment of any such taxes, whom such papers are tendered shall receive the same, giving the party tendering a receipt stating that he has received the same for the purpose of identification and verification.

"2. He shall at the same time require such taxpayer to pay his taxes in coin, legal tender notes, or national bank bills, and upon payment give him a refusal to pay the taxes, refusal to pay the taxes due shall be collected as all other delinquent taxes are collected.

"3. He shall mark each paper as coupons so received, with the initials of the taxpayer from whom received, and the date of receipt and shall deliver the same, securely sealed up, to the Judge

of the County Court of the County or Hustings Court of the city in which such taxes, debts, or demands are payable. The taxpayer shall thereupon be at liberty to file his petition in said County Court against the Commonwealth. A summons to answer which petition shall be served on the Commonwealth's attorney, who shall appear and defend the same. The petition shall allege that he has tendered certain coupons in payment of his taxes, debts and demands, and pray that a jury be impanelled to try whether they are genuine, legal coupons, which are legally receivable for taxes, debts and demands. Upon this petition an issue shall be made in behalf of the Commonwealth which shall be tried by a jury and either party shall have a right to exceptions on the trial and of appeal to the Circuit Court and Court of Appeals. If it be finally decided in favor of the petitioner that the coupons tendered by him are genuine, legal coupons, which are legally receivable for taxes, and so forth, then the judgment of the Court shall be certified to the treasurer, who, upon the receipt thereof, shall receive said coupons for taxes and shall refund the money before then paid for his taxes by the taxpayer out of the first money in the treasury, in preference to all other claims.

"4. Whenever any taxpayer shall apply to any court in this Commonwealth for a *mandamus* to compel any person authorized to receive or collect taxes, debts or demands due the Commonwealth to receive coupons for taxes, it shall be the duty of such person to make return to said *mandamus* that he is ready to receive said coupons in payment of such taxes, debts and demands, as soon as they have been legally ascertained to be genuine, and the coupons, which by law are actually receivable upon such return, the court before whom the application is made shall require the petitioner to pay his taxes to the tax collector of his county or city, or to the treasurer of the Commonwealth, and upon filing the receipt for such taxes in such Court the said Court shall direct the petitioner to file his coupons in such Court, which shall then forward the same to the County Court of the county, or Hustings Court of the city where such taxes are payable, and direct such Court to frame an issue between the petitioner as plaintiff and the Commonwealth as defendant as to whether the coupons so tendered are genuine coupons, legally receivable for taxes. On the trial of the cause the attorney for the Commonwealth in the lower Courts, and the Attorney-General in the Supreme Court of Appeals, shall appear for the Commonwealth, and require proof of the genuineness and legality of the coupons in issue. Either party shall be entitled to exceptions, and an appeal to the Circuit Court and Supreme Court of Appeals on the trial of this issue. If the decision be finally in favor of the petitioner the *mandamus* shall issue requiring the coupons to be received for said taxes and so forth; and they shall be so received; and on the certificate of such judgment the treasurer of the commonwealth shall forthwith refund to the taxpayer the amount of currency or money

before then paid by him out of the first money in the treasury, in preference to all other claims.

"5. This Act shall be in force from its passage."

Va. Act of Jan. 14, 1882.

"SECTION 4. The said Supreme Court, besides having jurisdiction of all such matters as are now pending therein, shall have jurisdiction to issue writs of *mandamus* and prohibition to the Circuit and Corporation Courts, and to the Hustings Court of the City of Richmond, and all others in which it may be necessary to prevent a failure of justice, in which a *mandamus* may issue according to the precepts of the common law, provided that no writ of *mandamus*, prohibition, or any other summary process whatever, shall issue in any case of the collector or attempt to collect revenue, or compel the collecting officers to receive anything in payment of taxes other than as provided in chapter forty-one, Acts of Assembly, approved January twenty-six, eighteen hundred and eighty-two, or in any case arising out of the collection of revenue, in which the applicant for the writ of process has any other remedy adequate for the protection and enforcement of his individual right, claim and demand, if just. The practice and proceedings upon such writs shall be governed and regulated, in all cases, by the principles and practice now prevailing in respect to writs of *mandamus* and prohibition respectively.

"2. This act shall be in force from its passage."

Va. Act of April 7th, 1882.

90. "Every attorney-at-law, in addition to being licensed, sworn and admitted to prosecute or defend actions or other proceedings in the Courts of this Commonwealth, on the retainer of clients, shall obtain a revenue license, and no person shall act as attorney-at-law or practice in the Courts of this Commonwealth without a separate revenue license. A revenue license to practice law in any county or corporation shall authorize such attorney to practice in all Courts of this State without additional license. Any persons violating the provisions of this section shall pay a fine of not less than fifty dollars nor more than one hundred dollars for each offense. Any person who shall appear before any committee of either branch of the General Assembly, and for fee, reward or compensation shall speak, write, print, or use before them any argument for or against any measure or proposition to be passed upon by the General Assembly, except counsel appearing in contested election cases, cases of impeachment of public officers, or before committees appointed to investigate charges preferred against public officers, shall pay a license tax of one hundred dollars. Such person may, by the chairman or any other member of any committee, be required to state on oath whether or not he expects to recover any fee, compensation or reward for services rendered or information furnished

upon any measure of legislation before or to be brought before the same. For any violation of this provision the person so offending shall be deemed guilty of a misdemeanor, and on conviction thereof shall be confined in jail not more than one year and fined not less than two hundred dollars.

Va. Act of March 15, 1884; Acts of Va., 1883–84, p. 596.

LICENSE AS TO ATTORNEYS-AT-LAW.

91. "Every attorney-at-law who has been licensed for less than five years shall pay fifteen dollars; and on attorneys who have been licensed and practiced for five years and more, twenty-five dollars, provided that no attorney-at-law shall be required to pay more than fifteen dollars whose receipts are less than five hundred dollars per annum; provided further, no attorney licensed under this act shall be allowed to bring suit against this Commonwealth or any treasurer or collector of taxes, for the recovery of money for coupons tendered for taxes, unless he take out a special license therefor; for which privilege he shall pay a specific license tax in addition to the tax required under this section, of two hundred and fifty dollars." (*Idem*, pp. 596, 597).

ARGUMENT.

The facts heretofore stated, put in a condensed form, are these:

(1) That the petitioner is indicted and held in the Hustings Court of Richmond for an alleged violation of a State statute.

(2) The alleged crime consists in having brought a suit as an attorney under the provisions of the Act of January 14th, 1882, that suit being the only remedy provided by the laws of Virginia to enforce the payment of tax-receivable coupons, this Court having explicitly decided that the coupons in question constitute "a valid contract with all persons taking them to receive them in payment of taxes and State dues," and that any act "conflicting with this contract, is void;" (*Antoni* vs. *Greenhow*, 107 U. S., 769, and *Antoni* vs. *Hartman*, 102 U. S., 672), and that "the right of the coupon-holder is to have his coupons received for taxes when tendered." (*Antoni* vs. *Greenhow*, 107 U. S., 769.

More briefly still; the petitioner is detained in custody by a State Court for an alleged violation of a State statute which forbids

him as an attorney to bring a coupon suit except after taking out a special license tax of $250.

When we say "*special* license tax" heve we mean a license tax *not required in any other case than that of a coupon suit.*

It is manifestly of the first importance to see whether the question or questions thus presented have been decided in the recent case of *ex-parte T. Temple Crouch* (November 10, 1884).

The statement of that case by this Court is as follows :

"The general revenue law of Virginia provides that no person shall do business in the State as a 'sample merchant' until he has obtained a license therefor, on payment of á tax of seventy-five dollars ; and that if he does he shall pay a fine of five hundred dollars for the first offence, and six hundred dollars for each succeeding offence. (Acts of Virginia, 1884, c. 445, secs. 30, 31, pp. 578, 579). The petitioner has been informed against, and is now held in custody for trial by order of the Hustings Court of the City of Richmond for a violation of this law. According to the statements in the petition presented to us the defense of the petitioner upon the trial of that case will be a tender by him before commencing business to the proper revenue officer of the State of the amount of the required license tax in coupons cut from State bonds, which the State when it issued the bonds agreed should be receivable in payment of all State dues, and a refusal of the officer to accept the tender and give a proper certificate therefor, because by a statute enacted after the issue of the bonds the tax receiving officers were prohibited from taking the coupons for this tax."

This Court further says :

"The right of the petitioner to a writ of *habeas corpus* from this Court is put in the petition on the ground that the petitioner is detained in custody by a State Court, in violation of the Constitution of the United States, because the statute which prohibits the officer from accepting the coupons impairs the obligation of the contract of the State to receive them, and is, on that account, inoperative and void, by reason of the provision of the Constitution which precludes the State from passing such laws.

"It is not claimed that the law which imposes the tax and fixes the penalty for doing business without its payment is unconstitutional."

Difference of fact and differences of principle, we think exist between that case and the present.

Differences of Fact : In the first place, the license tax here in question is not one exacted from or laid upon all of any class of persons,

nor upon all persons following a particular occupation. It is laid only upon lawyers, *who wish, or have occasion, to bring a coupon suit.*

In the second place, there is not here, as in *ex parte* Crouch, any *tender* of coupons by the petitioner.

DIFFERENCES OF PRINCIPLE: In *ex parte* Crouch, there was no question of the *jurisdiction* of the State Court to try the petitioner for the offence charged; the only question was whether the offence had been committed. The law creating the offence was plainly constitutional; but the accused claimed that he had not committed the offence charged.

In the case at bar, our claim is that the Act of Virginia declaring the offence, is unconstituiional and void: and hence that the State Court had no jurisdiction to indict, imprison, or try the petitioner.

In *ex parte* Crouch, this Court could not assume that the State Court would overrule the defense founded on the tender of coupons or would sustain the constitutionality of the law of Virginia which the defendant assailed.

In the case at bar, the State Court has sustained the constitutionality of the law which we assail, by arresting and imprisoning the petitioner under that very law.

Without further specification here, it is plain that the decision of *ex parte Crouch*, does not control this case.

It is our plan to consider, *first*, the questions proposed in this case, by the Court; and *next*, such other questions as may seem to us to be involved and necessary to its determination.

I.

"Whether the Hustings Court of Richmond is the highest Court of the State in which there can be a decision under the indictment in this case, upon the question whether the statute for the violation of which the petitioner is held in custody, is in contravention of the Constistution of the United States?"

This question must be answered in the negative, as appears by this citation:

"A writ of error shall lie, in a criminal case, to the judgment of

a circuit or a corporation or Hustings Court, from the Supreme Court of Appeals."

Code of Va., Sec. 3, p. 1257.

II.

"Whether this Court has jurisdiction to issue a writ of habeas corpus to inquire into the cause of the detention of a person held in custody of a State Court for trial and before his trial, if he is held in violation of the Constitution or of a law or a treaty of the United States?"

Summarizing the statutory provisions already cited which fix the jurisdiction of this Court in *habeas corpus;* the 14th section of the Judiciary Act of 1789, provided that the writ should in no case extend to prisoners in jail, unless they were in custody under or by color of the authority of the United States, or were committed for trial before some Court of the same, or were necessary to be brought into Court to testify.

But in 1833, when the nullification proceedings were adopted in South Carolina, the writ was extended to those who were in custody for an act done in pursuance of a law of the United States, or of a judgment of any of its Courts (*4 Stat., 634*).

In 1842, as a consequence of the McLeod case, the writ was extended to foreigners acting under an authority and sanction of their own government (*5 Stat., 539*).

Finally, following the late civil War, for reasons too obvious or well known to need statement here, the writ was extended to "all cases where any person may be restrained of his or her liberty in violation of the Constitution, or of any treaty or law of the United States." (*Act of Feb. 5*, 1867, *14 Stat.* 385.)

The jurisdiction conferred by the last-named Act of Congress has manifestly suggested the form and substance of the above question of this Court.

1. This Court has express jurisdiction to issue this writ to inquire into the cause of the detention of any person at any time held in custody by a State Court or any other Court, if he is held in violation of the Constitution, a law or a treaty of the United States.

This proposition is broader than the question of the Court, but not broader than the law.

The Act of Feb. 5, 1867, was entitled, "An Act to amend 'An Act to establish the judicial Courts of the United States,' approved September 24, 1789," and provided, in terms, that the Courts and Judges of the United States "shall have power to grant writs of *habeas corpus* IN ALL CASES where any person may be restrained of his or her liberty IN VIOLATION OF THE CONSTITUTION OR OF ANY TREATY OR LAW OF THE UNITED STATES."

But this is not all. The act further provided, in detail, for the issuing forthwith of the writ upon the petition of the person detained; the speedy return of the writ, with the body; the traverse, if desired, of the allegations of the return; the summary determination of the facts by the Court or Judge; the severe punishment of any person refusing to make return to the writ or making a false return; and *finally*, that "if it shall appear that the prisoner is deprived of his or her liberty in contravention of the Constitution or laws of the United States, he or she SHALL FORTHWITH BE DISCHARGED AND SET AT LIBERTY."

No one can read this Act without finding in it a strong illustration of the tenderness of the law upon the questions which this writ is designed to raise—questions of personal liberty—as well as of the clear tendency of our statutory law to provide, in the words of Chief Justice MARSHALL, "the efficient means by which this great constitutional privilege should receive *life and activity*." *Ex parte Bollman and Swartwout*, 4 Cranch, * 95.

When, in 1873–'74, these provisions were codified or revised, much of the stringency of the details of this act was omitted, the Revised Statutes retaining only the substance of the act—the language now being: "The writ of *habeas corpus* shall in no case extend to a prisoner in jail, unless where * * * he is in custody in violation of the Constitution, or of a law or treaty of the United States." * * * *R. S.*, 142.

We are concerned now with the question, whether this Court has

jurisdiction to issue this writ to inquire into the case of a person held by *State* authority in violation of the Constitution of the United States; which is equivalent to the question, whether this Court has power to discharge and set at liberty a person so confined, upon a writ of *habeas corpus*.

"In custody in violation of the Constitution of the United States."

Surely, these words scarcely need interpretation or construction. Here are no technical words, or terms of legal art; no abstruse phrases, no occult meanings. Not even the light of history or usage is needed to illumine them. There are no simpler or clearer terms by which to translate or paraphrase them.

One or two propositions, preliminary to our main conclusions, are in place here:

FIRST. No Court in this nation has JURISDICTION to hold any person in custody in violation of the Constitution.

No matter what State laws or State acts may attempt to do, or may *say*, jurisdiction cannot be conferred on any Court, State or Federal, to imprison a person *in violation of the Constitution*.

Second. A State law which is in contravention of the Constitution is void, and confers no jurisdiction or authority on any one.

Thus, in *ex parte Siebold*, 100 U. S., which was *habeas corpus* to relieve from imprisonment, upon conviction and sentence of the petitioners, this Court said, "The vaiidity of the judgment is assailed on the ground that the Acts of Congress under which the indictments are found, were unconstitutional. If this position is well taken, it affects the foundation of the whole proceedings. An unconstitutional law is void, and is as no law. An offense created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment" (pp. 376, 377).

So, in *ex parte Virginia*, *idem.*, 343, this Court said: "Where a prisoner is held without any lawful authority, or by an order be-

yond the jurisdiction of the Court to make, this Court will, in favor of liberty, grant the writ; not to review the whole case, but to examine the authority of the Court below to act at all" (p. 343).

In all the fluctuations of judicial opinion, the doctrine has stood firm, as stated by Chief Justice MARSHALL, in 1803, in *Marbury vs. Madison*, that "an Act of the Legislature repugnant to the Constitution is void;" and, as stated by this Court seventy-five years later, in *Board of Liquidation vs. McComb*, that "An unconstitutional law will be treated by the Courts, as null and void."

THIRD. A State Court has no more jurisdiction to hold a person in custody in violation of the Constitution than has a Federal Court.

In the cases already cited, and in fact in most of the cases decided, the writ has run from this Court to some inferior *Federal* Court, but it seems obvious that it cannot be limited to such Courts.

The language of the statute extends the writ to "ALL CASES *where the prisoner is in custody in violation of the Constitution.*"

This must be so; for the Constitution is the supreme law of the nation; every man is entitled to its protection as against any and all power of whatever kind, within the limits of the United States. But especially in the great concern of personal liberty, the bulwark of the Constitution stands perpetually, and the shield of this writ is always uplifted in defense of the citizen.

But we have the very highest authority, short of an express decision of this Court, for this position.

In *ex parte Bridges*, 2 Woods, 428, this exact question arose, and was decided by the Circuit Justice of the Fifth Judicial Circuit. The following note is appended to the report of this case by the reporter: "*Note.*—The opinion in the above case having been written in much haste—from the pressure of business on this Circuit—and the subject being one of great importance, the Circuit Justice has revised it for the purpose of presenting his views more clearly and explicitly, and as revised, it is given above" (p. 432).

In this case the petitioner was indicted in the Superior Court of Randolph County, Georgia, for perjury, committed in an examination before a United States Commissioner, under the Enforcement Act. The offense was charged to have been committed against the

laws of Georgia, but the Circuit Justice remarks that "it was a crime against *the laws of the United States only.* It was perjury committed in the course of a judicial investigation under the acts of Congress, and was an offense against the public justice of the United States" (p. 429).

"The offense is exclusively cognizable in the Courts of the United States. * * *

The (State) Court had no jurisdiction of the case. The proceedings were null and void" (p. 430).

The Circuit Justice continues:

"It is contended, however, that where a defendant has been regularly indicted, tried and convicted in a *State* Court, his only remedy is to carry the judgment to the Court of last resort, and thence by writ of error to the Supreme Court of the United States, and that it is too late for a *habeas corpus* to issue from a *federal* Court in such a case. This might be so if the proceedings in the *State* Court were merely erroneous; but where it is void for want of jurisdiction, *habeas corpus* will lie, and may be issued by any court or judge invested with supervisory jurisdiction in such case." *Exparte Lange*, 18 Wall, 163.

The Circuit Justice, after stating the general rule that "where it appears by the return to the writ that the prisoner is confined on a regular charge and commitment for a criminal offence, and especially if he be confined in execution after a conviction, he will be at once returned into custody," reviews the several acts of Congress, in historical order, and after quoting the words of the Act of February 5, 1867, that "in all cases where any person may be restrained of his or her liberty in violation of the Constitution," and the words making the writ issuable, in such cases, by "the several Courts of the United States, and the several Justices and Judges of said Courts within their respective jurisdictions," says:

"The present case clearly belongs to the last category. The relator was certainly 'restrained of his liberty in violation of a law of the United States.' And although it may appear unseemly that a prisoner, after conviction in a State Court, should be set at liberty by a single Judge on *habeas corpus*, THERE SEEMS TO BE NO ESCAPE FROM THE LAW. If it were a case in which the State Court had jurisdiction of the offense, the general rule of the common law would intervene, and require that the prisoner should be remanded, and left to his writ of error. In such a case, although the judgment were erroneous, the imprisonment would not be in violation of the Constitution or laws of the United States. The judgment might be wrong, but the imprisonment under it would be right until the judgment was reversed. But, as before shown, *the State Court had no jurisdiction of the offense.*"

The opinion closes thus:

"It might be a wise amendment of this law, to provide that in all cases after conviction, the party should be put to his writ of error to the Supreme Court of the United States. The above statutes are condensed in section 753 of the Revised Statutes of the United States. They have had the effect greatly to enlarge the jurisdiction in the Courts of the United States by *habeas corpus*, since the first enactment on the subject in 1789. They have removed all impediment to its use which formerly existed where the prisoner was committed under State authority, provided his imprisonment is contrary to the United States Constitution or laws."

This case—*ex parte Bridges*—be it observed, was decided on Circuit in 1875, though when the revised opinion was prepared or filed we have no means of knowing. It was made, therefore, *after* and doubtless in view of the Act of March 27, 1868, *15 Stat.*, 44, which takes away all jurisdiction from this Court, of appeals or writs of error, to review a decision of a Circuit Court upon a writ of *habeas corpus* in the case of a person "alleged to be restrained of his liberty in violation of the constitution or of any law or treaty of the United States."

The query would seem to have been in the mind of this Court, in propounding the *first* question in this case, whether it is not necessary that the Court to which the writ of *habeas corpus* runs from this Court, should be one to which a writ of error also lies from this Court?

Examination cannot fail to settle this point and remove all doubt. The true rule is stated by the Circuit Justice in *ex parte Bridges*, thus:

"Where the judgment is void for want of jurisdiction, *habeas corpus* will lie, and may be issued by any Court or Judge invested with supervisory jurisdiction in such case. *Ex parte Lange*, 18 Wall., 163."

Ex parte Lange was decided in 1873, and affirmed in a specially solemn (deliberate) manner, the doctrine of this Court, upon all its precedents, that "where a prisoner shows that he is held under a judgment of a *Federal* Court, made without authority of law, this Court will, by writs of *habeas corpus* and *certiorari*, look into the record, so far as to ascertain that fact, and if it is found to be so, *will discharge the prisoner*."

The *Lange* case is in all respects one of the most impressive precedents, on questions of *habeas corpus*, in this Court. Without invidious comparison, it may be said that the principles of this writ and

its applications, as well as the controlling efficacy of the Constitution, and the binding obligation resting on courts to enforce its provisions, particularly what the Court there calls "the salutary principles of the common law" which have been "embodied in the Constitutions of the several States and of the United States," referring specially to the provisions in support of personal liberty, are treated with unsurpassed fullness and vigor.

In the *Lange* case the petitioner was in custody of the United States Marshal, in execution of a sentence of the Circuit Court of the United States. The controlling question was, whether the Court below had authority, having imposed fine *and* imprisonment, where the Statute prescribed fine *or* imprisonment, and the fine had been paid, to impose imprisonment alone instead of the former sentence, and it was *held*, that the second judgment was void for want of power, and that the petitioner *must be discharged*.

But what we wish here to call attention to, is the conclusion stated in *ex parte Bridges*, which seems to be in the nature of a limitation of the rule, namely: "may be issued by any Court or Judges *invested with supervisory jurisdiction in such case*."

If these words, which do obviously express a part of the true rule, suggest a difficulty in this case inasmuch as, as we have seen, no writ of error lies from this Court to the Hustings Court of Richmond, the plain and all-sufficing answer is that by section 753 of the Revised Statutes, this Court is given jurisdiction "*in all cases where a person is held in custody in violation of the Constitution*;" or in the exact words of the Circuit Justice, in *ex parte Bridges*, this Court is "*invested with supervisory jurisdiction in such case*."

If the doubt be suggested, whether the same rule holds good in the case of a mere indictment, and before a trial, or as the Court's question puts it, "a person held in the custody of a State Court for trial, and before his trial," our answer is that this doubt or suggestion seems to have been resolved in the case of *ex parte Virginia*, 100 U. S., 339, where the Court said in reference to a similar suggestion:

"It is said there is nothing to appeal from, that no decision or judgment has been given in the inferior Court, and that the appeal, if any, is taken from the Grand Jury. *This is a mistake*. The bench-warrant was an order of Court, and the validity of the bench-warrant is the matter in question. It is true there has been no

final judgment or decision of the whole case, but an appeal may lie, and in many Courts does lie, from a merely interlocutory order" (p. 342).

The petitioner here is held under the bench-warrant of the Hustings Court.

The latest reported case in this Court, on *habeas corpus*, is at least instructive here—*Robb vs. Connolly*, 111 U. S., 624—which was in error to the Supreme Court of California.

The petitioner in *habeas corpus* was arrested in California, and delivered to the agent of the State of Oregon as a fugitive from justice in the latter State, the arrest being made on the warrant of the Governor of California. Petitioner sued out a writ of *habeas corpus* in the Superior Court for the City and County of San Francisco, directed to Robb, plaintiff in error, and agent of the State of Oregon. Robb refused to produce the petitioner, and was thereupon adjudged in contempt, and committed to jail, *nisi et donec.* Robb thereupon sued out a writ of *habeas corpus* in the Supreme Court of the State, and, upon hearing, the writ was dismissed, and Robb remanded to jail. From this judgment Robb prosecuted his writ of error.

In a learned and elaborate opinion, this Court held, in brief, that "subject to the exclusive and paramount authority of the National Government, by its own judicial tribunals, to determine whether persons held in custody by authority of Courts or officers of the United States, are so held in conformity with law, the *States* have similar authority by their own Courts, within their respective territorial limits; and, if the restraint is adjudged to be illegal, to discharge the prisoner, notwithstanding such illegality may arise (solely) from a violation of the Constitution and laws of the United States" (*p.* 639), and the judgment below was affirmed.

It is true this case was on writ of error, and not on *habeas corpus*, in this Court, but it is significant, for our present purposes, that the Court assumes, throughout its opinion, that the only possible doubt is whether the jurisdiction of the Courts of the United States is *exclusive of that of the State Courts.*

The present case differs, so far as our search has gone, from any case yet decided by this Court. Whether this difference is one of

principle, or merely one of detail, is a matter for consideration. Whether this difference relates to the *jurisdiction* of this Court over the present case, is of course a serious and fundamental inquiry. Conceding, as it seems to be established by the authorities cited, and especially by *ex parte Bridges*, that the Circuit Court of the United States, or the Circuit Justice or Judge, has jurisdiction under the Act of 1867 (Sec. 751 to 766, Rev. Stat.), to discharge a prisoner held by a State Court in violation of the Constitution or laws of the United States, the question might be considered as remaining to be answered,—whether this Court, *as a Court*, has such jurisdiction. It is, perhaps, wisest for us to assume that this question deserves discussion here.

The language of the Act of 1867 and of the present Rev. Stats. is that the "Supreme Court and the Circuit Courts and District Courts" and "the several Justices and Judges of the said Courts, *within their respective jurisdictions*, shall have power to grant writs of *habeas corpus*, &c., &c., for the purpose of an inquiry, &c., where the prisoner is in custody *in violation of the Constitution*, &c."

It has been suggested that the clause "within their respective jurisdictions," leaves the question to be answered, What are the respective jurisdictions of these Courts? Our interpretation of this phrase or clause has been and would be still, that it is used here only in what we call the *territorial* sense; that is to say, each of the Courts and each of the Justices named is given power to issue this writ within the territory covered by his authority or jurisdiction, and that by consequence it confers upon this Court, as a Court, power to issue the writ anywhere within the United States, precisely as the Circuit Court and Judges or the District Court and Judges are given power to issue the writ within the territory comprised in their circuits or districts.

But there is, of course, another meaning of the word "jurisdiction," namely, judicial power or authority to hear and determine causes. If this word can be supposed to be used here in the latter sense, it might become necessary to inquire what is the jurisdiction of this Court, in *habeas corpus*, and does it extend to such a case as the present one? In other words, this would raise the question finally, whether Congress had power by the Act of 1867 or by the present Rev. Stats. to confer on this Court, as a Court, power to issue this writ in such a case as the present one. This certainly

opens a very broad subject, and one which it is impossible for us to treat with as much brevity as might be desirable.

Beginning with elementary propositions, this Court, under the Constitution, has *original* and *appellate* jurisdiction.

All this is set forth in a most elaborate and masterly manner in the opinion in *Marbury vs. Madison*, 1 Cranch, *137.

The original jurisdiction of this Court, as fixed by the Constitution, extends to "all cases affecting ambassadors, other public ministers and consuls and those in which a State shall be a party." (Sec. 2, Art. 3, Const. U. S.). The appellate jurisdiction of this Court by the same clause is declared to extend to "all other cases before mentioned, both as to law and to fact, with such exceptions and under such regulations as Congress may make." The "other cases" above mentioned, are cases, of course, embraced in the first section of article 3 and in the first paragraph of section 2.

It is plain that the power to issue the writ of *habeas corpus* in the present case is not embraced within the grant of *original* jurisdiction to this Court by the Constitution, and it must, therefore, be a power exercised under the grant of *appellate* jurisdiction. An examination of all the decisions of this Court upon the subject of its jurisdiction in *habeas corpus*, would be tedious and seems to be unnecessary; but it may be observed that the case of *ex parte Yerger* as well as some other cases in this Court during the last twenty years, contains a full statemenf of the course of decision in this Court upon this questien.

In *ex parte Yerger* (1868) the Court states the result of the former decisions of this Court very fully. Quoting the clause of the Constitution respecting the writ of *habeas corpus*, the Court says: "The terms of this provision necessarily imply judicial action. In England all the higher Courts are open to applicants for the writ, and it is hardly supposable that under the new Goverment, founded on more liberal ideas and principles, any Court would be, intentionally, closed to them."

The Court then recites the provisions of the 14th. Section of the Judiciary Act of 1789, and holds that this Court "is one of the Courts to which the power to issue writs of *habeas corpus* is expressly given by the terms of this section;" and continues: "But the power vested in this Court is in an important particular unlike that possessed by the

English Courts. The jurisdiction of this Court is conferred by the Constitution, and is *appellate*, whereas that of the English Courts, though declared and defined by statutes, is derived from the common law, and is *original*." In passing, here the Court remarks significantly: "If the question were a new one, it would perhaps deserve inquiry whether Congress might not, under the power to make exceptions from this appellate jurisdiction, extend the original jurisdiction to other causes than those expressly enumerated in the Constitution, and especially in view of the constitutional guaranty of the writ of *habeas corpus*, to cases arising upon petition for that writ." The Court then proceeds thus: "But in the case of *Marbury vs. Madison*, it was determined upon full consideration, that the power to issue writs of *mandamus* given to this Court by the 13th. section of the Judiciary Act is, under the Constitution, an *appellate* jurisdiction, to be exercised only in the revision of judicial decisions, and this judgment has ever since been accepted as fixing the construction of this part of the Constitution.

It was pronounced in 1803. In 1807 the same construction was given to the provision of the 14th. section relating to the writ of *habeas corpus*, in the case of *Bollman vs. Swartwout*. The Court, after referring to other cases, says: "The doctrine of the Constitution and of the cases thus far may be summed up in these propositions:

"(1) The original jurisdiction of this Court cannot be extended by Congress to any other cases than those expressly defined by the Constitution.

"(2) The appellate jurisdiction of this Court conferred by the Constitution extends to all other cases in the judicial power of the United States.

"(3) This appellate jurisdiction is subject to such exceptions and must be exercised under such regulations as Congress in the exercise of its discretion has made or may see fit to make.

"(4) Congress not only has not excepted writs of *habeas corpus* and *mandamus* from this appellate jurisdiction, but has expressly provided for the exercise of this jurisdiction by means of these writs.

"We shall assume, upon the authority of the decisions referred to, what we should hold were the question now for the first time presented to us, that in a proper case this Court, under the Act of 1789 and under all the subsequent acts giving jurisdiction in cases of *habeas corpus*, may, in the exercise of its appellate power,

revise the decisions of the inferior Courts of the United States and relieve from unlawful imprisonment, authorized by them, except in cases within some limitations of the jurisdiction by Congress."

Rejecting the argument pressed upon the Court, that "to bring a case within the appellate jurisdiction of this Court, in the sense requisite to enable it to award a writ of *habeas corpus* under the Judiciary Act, it is necessary that the commitment should appear to have been by a tribunal whose decisions are subject to revision by this Court," and after an examination of the cases upon that point in this Court, the Court says: "The great and leading intent of the Constitution and the law must be kept constantly in view upon the examination of every question of construction. That intent in respect to the writ of *habeas corpus* is manifest. It is that EVERY CITIZEN MAY BE PROTECTED BY JUDICIAL ACTION FROM UNLAWFUL IMPRISONMENT."

The Court then notices the provisions of the Act of 1789, of 1833, of 1842 and of 1867—showing the gradual extension of its jurisdiction as well as that of the other Courts, to the present point, namely, "All cases where any person may be restrained of liberty in violation of the Constitution or of any treaty or law of the United States" (page 102).

Upon the facts of the case there presented, the Court reaches its final conclusion, thus: "We are obliged to hold, therefore, that in all cases where a Circuit Court of the United States has, in the exercise of its original jurisdiction, caused a prisoner to be brought before it and has, after inquiring into the cause of detention, remanded him to the custody from which he was taken, this Court, in the exercise of its appellate jurisdiction may, by the writ of *habeas corpus*, aided by the writ of *certiorari*, revise the decision of the Circuit Court, and, if it be found unwarranted by law, relieve the prisoner from the unlawful restraint to which he has been remanded."

It is, perhaps, needless to add, that in *ex parte Yerger* the Court had before it the question of the effect of the repeal of part of the Act of March, 1867, by the Act of March 27, 1868, upon which it was *held* that that act did take away "the appellate jurisdiction authorized by the Act of 1867," but was limited in terms to the Act of 1867, and did not extend to acts prior to 1867—and, consequently,

the Court affirmed the jurisdiction of this Court to isssue the writ prayed for.

It follows that, so far as the jurisdiction of this Court in the present case was conferred by the Act of 1867 (14 Stat., 385), it was taken away by the Act of March, 1868 (15 Stat., 44). But that repeal was by its terms limited to "so much of the Act of 1867 as authorizes *an appeal from the judgment of the Circuit Court* to the Supreme Court of the United States, or the exercise of any such jurisdiction by said Supreme Court on appeals which have been or may hereafter be taken." And thus the law stands at the present time, the Act of 1867, as modified by the repealing Act of 1868, being still embodied in the Revised Statutes.

It being, then, settled that the jurisdiction of this Court in *habeas corpus* is appellate, and that it does not extend to appeals from judgments of the Circuit Court of the Unitad States, the necessary inquiry in the present case is, Does it extend to the hearing on *habeas corpus* of petitions of persons confined by State authority, *in violation of the Constitution or laws of the United States?*

It has already been seen that this Court holds that appellate jurisdiction is not limited to cases of commitment by a tribunal *whose decisions generally are subject to revision by this Court.*

The fact, therefore, that the decisions of the Hustings Court of Richmond are not reviewable on writ of error in this Court, as we have already shown, does not tend to limit the jurisdiction of this Court in the present case. If, then, the true construction of Chap. 13 of the Revised Statutes, or of the Act of 1867, as modified by the Act of 1868, gives this Court, as a court, jurisdiction on *habeas corpus* in a case where a prisoner is "in custody in violation of the Constitution or of a law or treaty of the United States," then we have *statutory* authority certainly, for the jurisdiction of this Court in the present case.

Is there anything in the jurisdiction thus conferred by Acts of Congress on this Court, which is inconsistent with the Constitution or the constitutional grant and distribution of the judicial power of the United States? Nothing occurs to us which supports or suggests such an objection.

We take it that it would not be disputed that this Court could relieve from imprisonment on *habeas corpus* any person confined by authority of any United States Court, in violation of the Constitution; and we understand that such a conclusion is involved in the decisions of this Court in *ex parte Virginia* and *ex parte Siebold* (100 U. S., 339, 371), in the latter of which cases it was *held*, in terms, that "the appellate jurisdiction of this Court, exercisible by the writ of *habeas corpus*, extends to a case of imprisonment upon conviction and sentence of a party by an inferior Court of the United States, under and by virtue of an unconstitutional Act of Congress, whether this Court has jurisdiction to review the judgment of conviction, on writ of error or not."

If, therefore, this Court is bound to inquire into the cause of commitment, under the terms of the Revised Statutes, which gives jurisdiction to this Court in *habeas corpus* "*within its respective jurisdiction*;" and if jurisdiction is there used, in a *territorial* and not in a *judicial* sense, the conclusion would seem a necessary one, both upon the authorities, as well as upon the terms of the statutes, that this Court has jurisdiction in the present case.

But wish to present the argument on this point in another, and perhaps more convincing form.

The Constitution by Sec. 2 of Art. III. provides that "the judicial power shall extend *to all cases in law and equity arising under this Constitution*, the laws of the United States, and treaties made, or which shall be made under their authority," &c. "In all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. *In all the other cases before mentioned the Supreme Court shall have appellate jurisdiction* both as to law and fact, with such exceptions and under such regulations as the Congress shall make."

1. The appellate jurisdiction of the Supreme Court extends not only over the inferior Federal tribunals, but over *all State tribunals.*

The first Judiciary Act of 1789 recognized this jurisdiction, and provided for reviewing the decisions of State Courts by writ of error in cases involving the Constitution, laws or treaties of the United States.

The constitutionality of this act has been uniformly sustained, and the jurisdiction to review the decisions of State Courts by writs of error is daily exercised by this Court.

2. It is true that the Act of 1789 and the subsequent acts regulating the jurisdiction of this Court, have provided for a writ of error to review only a limited class of cases, and have prescribed that the writ shall issue only in case of a *final judgment or decree* of the *highest Court of the State* in which the question could be determined. But there can be no doubt that Congress has the constitutional power in any case "arising under the Constitution," to give the Supreme Court the right to review the proceedings of *any State Court*, at *any stage of the case.*

There is nothing in the Constitution limiting the appellate jurisdiction of the Supreme Court to a review of the decisions of any particular class or grade of tribunals, nor is there anything in the Constitution limiting the appellate jurisdiction of the Supreme Court to final judgments or decrees, as distinguished from interlocutory orders or proceedings. Nor is there anything in the nature of *appellate jurisdiction itself* which precludes the idea of a review of interlocutory proceedings in a cause.

This will not, we presume, be seriously disputed.

The Constitution of the State of New York, for example, provides for a Court of Appeals, whose jurisdiction is exclusively appellate. Section 6 of Article VI. of the Constitution of 1846, as amended in 1869, provides that the Court shall have "*such appellate jurisdic-*

tion as now is or may be prescribed by law;" yet the Legislature has by its successive codes of practice, conferred upon that Court the right to review interlocutory orders of inferior tribunals as well as final judgments, and no one has ever had the hardihood to question the constitutionality of those provisions of law, or the right of the Legislature to extend, from time to time, the jurisdiction of the Court of Appeals over other interlocutory proceedings.

3. *Congress has given* to this Court the right to issue the writ of *habeas corpus* within its jurisdiction, in cases where a person is detained in violation of the Constitution or laws of the United States. There is no limitation or exception upon this phrase.

The *appellate jurisdiction* of this Court extends to *all cases* arising under the United States Constitution, and *therefore* it extends to *all Courts*, whether State or National.

The fact that its jurisdiction on *writ of error* has been restricted by Congress to particular cases and particular Courts is immaterial. Its jurisdiction in *habeas corpus* is *not restricted*, but is coextensive with the constitutional grant of power.

This has been expressly held as to the jurisdiction over the inferior *Federal* tribunals. This Court, as we have seen, asserts and exercises the right to review, by *habeas corpus*, the procedings of an inferior Federal tribunal in cases where they have no power to review by writ of error. The only warrant of authority for the exercise of such a jurisdiction is that the right to issue the writ of *habeas corpus*, is derived from the general grant of appellate jurisdiction given by the Constitution, together with the general language of the statute conferring the power to issue the writ of *habeas corpus*.

But, if this Court has the right to review, by *habeas corpus*, the decision of an inferior Federal tribunal, where it has no right to review such decision by writ of error or appeal, it follows, *of necessity*, that it has a like power to review by *habeas corpus*, the decision of a State tribunal where it has no right to review such decision by writ of error.

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IN THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1885.

No. 974.

EX PARTE WILLIAM L. ROYALL, NO. 1,

Appellant and Plaintiff in Error.

No. 975.

EX PARTE WILLIAM L. ROYALL, NO. 2,

Appellant and Plaintiff in Error.

APPEAL FROM AND IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

BRIEF FOR APPELLANT AND PLAINTIFF IN ERROR.

DANIEL H. CHAMBERLAIN,

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Supreme Court of the United States,

OCTOBER TERM, 1885.

[No. 974.]

Ex Parte WILLIAM L. ROYALL, No. 1,
Appellant and Plaintiff in Error.

APPEAL FROM AND IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF VIRGINIA.

[No. 975.]

Ex Parte WILLIAM L. ROYALL, No. 2,
Appellant and Plaintiff in Error.

APPEAL FROM AND IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

BRIEF OF APPELLANT AND PLAINTIFF IN ERROR.

These two cases may be conveniently stated and argued together.

STATEMENT.

In No. 974, the record shows that the appellant, a citizen of the State of Virginia, in June, 1884, sold a coupon cut from a bond of the State of Virginia, issued under the Act of Assembly of Vir-

ginia, approved March 30th, 1871, entitled "An Act to provide for the funding and payment of the public debt", said coupon being overdue when sold.

In No. 975, the record shows that the appellant, in 1884, brought a suit, under the employment of a client, to recover back money paid by said client for taxes after a tender of tax-receivable coupons therefor.

That in both cases, in the same month and year, the grand jury of the City of Richmond found an indictment against the appellant, in the one case, for selling a coupon of a bond of the State of Virginia, without a special license therefor; and in the other case, for bringing a suit to recover back money paid for taxes after a tender of coupons for the same, without a special license therefor.

The appellant, being arrested and held in custody by the proper officer, under said indictments, applied in each case to the Judges of the Circuit Court of the United States for the Eastern District of Virginia for a writ of *habeas corpus*, and for his discharge thereunder.

In each case the writ was refused and the petition dismissed.
Records, No. 974, *fol.* 6, No. 975, *fol.* 20.

From the orders in each of these two cases, the present appeals have been taken, agreeably to the provisions of the Act of Congress of March 3, 1885, entitled "An Act amending Section 764 of the Revised Statutes."

Vol. 23, p. 437, U. S. Statutes at Large.

The facts of the first of these cases have appeared before this Court on previous occasions: *First*, in *Ex parte Royall*, 112 U. S., 181, which was a motion for leave to file a petition for a writ of *certiorari* to bring here the record of the judgment and proceedings of the Circuit Court of the United States for the Eastern District of Virginia, under a writ of *habeas corpus* issued by that Court on application of the petitioner, for the purpose of inquiring into the cause of his detention under an indictment in the Hustings Court of the City of Richmond.

In that case this Court denied the application, on the ground that jurisdiction was taken away from this Court in such a case by the Act of Congress of March 27, 1868 (*15 Stat., 44*), and that this Court had no jurisdiction to review the judgment on writ of error.

Again, in the later case of *Ex parte Royall*, No. 2, a motion was made to this Court for leave to file a petition for a writ of *habeas corpus* in favor of the petitioner upon the same state of facts as appear in the record of the present case, No. 975.

This Court in granting leave to file the petition proposed two specified and detailed questions for discussion by counsel. These questions were discussed here in December, 1884, but no decision thereon has been announced.

These being appeals from "final decisions of the Circuit Court" in "cases described" in section 763 of the Revised Statutes, no question of jurisdiction seems to require notice. (*23 Stat. at Large*, 437).

Section 763 of the Revised Statutes provides as follows:

"From the final decision of any Court, Justice or Judge inferior to the Circuit Court, upon an application for a writ of *habeas corpus*, or upon such writ when issued, an appeal may be taken to the Circuit Court for the district in which the cause is heard;

1. In case of any person alleged to be restrained of his liberty in violation of the Constitution, or of any law or treaty of the United States.

2. In case of any prisoner who, being a subject or citizen of a foreign State, and domiciled therein, is committed or confined, or in custody by or under the authority or law of the United States, or of any State, or process founded thereon, for or on account of any act done or omitted under any alleged right, title, authority, privilege, protection or exemption, set up or claimed under the commission, order or sanction of any foreign State or sovereignty, the validity and effect whereof depend upon the law of nations, or under the law of nations, or under color thereof."

There can be no doubt that the present are cases in which it is "alleged that the prisoner is restrained of his liberty in violation "of the Constitution."

The sole question, therefore, requiring discussion here is: *Is the prisoner, Royall, restrained of his liberty in violation of the Constitution?*

Another statement of this question would be—Has a Circuit Court of the United States power to discharge a prisoner who is held under an indictment for trial and before trial on the ground that he is restrained of his liberty in violation of the Constitution?

The statutory provisions affecting this inquiry, are as follows:

(*Revised Stat., U. S.*):

"SEC. 752. The several Justices and Judges of the said Courts (District, Circuit and Supreme), within their respective jurisdictions, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of restraint of liberty."

"SEC. 753. The writ of *habeas corpus* shall in no case extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some Court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process or decree, of a court or judge thereof; or is in custody in violation of the Constitution, or of a law or treaty of the United States; or being a subject or citizen of a foreign State, and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection or exemption claimed under the commission, or order, or sanction of any foreign State, or under color thereof, the validity and effect whereof depend upon the law of nations; or unless it is necessary to bring the prisoner into Court to testify."

"SEC. 754. Application for the writ of *habeas corpus* shall be made to the Court, or Justice, or Judge authorized to issue the same, by complainant in writing, signed by the person for whose relief it is intended, setting forth the facts concerning the detention of the party restrained, in whose custody he is detained, and by virtue of what claim or authority, if known. The facts set forth in the complaint shall be verified by the oath of the person making the application."

"SEC. 761. The Court, or Justice, or Judge shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require."

ARGUMENT.

To the possible suggestion that the power here claimed, is an abridgment or invasion of the powers or rights of the courts of the States, it is enough to say that this result is only the necessary effect of the fact that *the Constitution is the supreme law of the land.*

I.

No State Court has or can have JURISDICTION to hold any American citizen in custody, in violation of the Constitution.

This is not, to any extent, a question of error, or of abuse of power even; it is a question of *power*, of *jurisdiction.*

II.

A State law, which is in contravention of the Constitution, is void, and confers no jurisdiction or authority on any one.

Thus, in *Ex parte* Siebold, 100 U. S., which was *habeas corpus* to relieve from imprisonment, upon conviction and sentence of the petitioners, this Court said:

"The validity of the judgment is assailed on the ground that the Acts of Congress under which the indictments are found were unconstitutional. If this position is well taken, it affects the foundation of the whole proceedings. An unconstitutional law is void and is as no law. An offense created by it is not a crime. A conviction under it is not merely erroneous, but it is illegal and void, and cannot be a legal cause of imprisonment" (pp. 376, 377).

So, in *Ex parte* Virginia, *Idem.*, 343, this Court said: "Where a prisoner is held without any lawful authority, or by an order beyond the jurisdiction of the Court to make, this Court will, in favor of liberty, grant the writ, not to review the whole case, but to examine the authority of the Court below to act at all" (p. 343).

In all the fluctuations of judicial opinion, the doctrine has stood firm, as stated by Chief Justice MARSHALL in 1803, in *Marbury vs. Madison*, 1 Cranch, 138, that "an act of the Legislature repugnant to the Constitution is void," and, as stated by this Court, seventy-five years later, in Board of *Liquidation vs. McComb*, 92 U. S., 531, that "an unconstitutional law will be treated by the Courts as null and void."

III.

A State Court has no more jurisdiction to hold a person in custody in violation of the Constitution than has a Federal Court.

In the cases already cited, and in fact in most of the cases decided, the writ has run from this Court to the executive officers of some inferior Federal Court, or of the United States; but it seems obvious that it cannot be limited to such cases.

The language of the statute extends the writ to "ALL *cases where the prisoner is in custody in violation of the Constitution.*"

This must be so; for the Constitution is the supreme law of the nation; every man is entitled to its protection as against any and all power of whatever kind, within the limits of the United States. But especially in the great concern of personal liberty, the bulwark of the Constitution stands perpetually, and the shield of this writ is always uplifted in defense of the citizen.

But we have the very highest authority, short of an express decision of this Court, for this position.

In *Ex parte Bridges*, 2 Woods, 428, this exact question arose, and was decided by the Circuit Justice of the Fifth Judicial Circuit (Mr. Justice BRADLEY). The following note is appended to the report of this case by the reporter: "Note—The opinion in the above case having been written in much haste—from the pressure of business on this Circuit—and the subject being one of great importance, the Circuit Justice has revised it for the purpose of presenting his views more clearly and explicitly, and as revised it is given above" (p. 432).

In this case the petitioner was indicted in the Superior Court of Randolph County, Georgia, for perjury, committed in an examination before a United States Commissioner, under the Enforcement

Act. The offense was charged to have been committed against the laws of Georgia, but the Circuit Justice remarks that "it was a crime against the laws of the United States only. It was perjury committed in the course of a judicial investigation under the acts of Congress, and was an offense against the public justice of the United States" (p. 429).

* * * * * * * *

"The offense is exclusively cognizable in the courts of the United States. * * *

The (State) Court has no jurisdiction of the case. The proceedings were null and void" (p. 430).

The Circuit Justice continues:

"It is contended, however, that where a defendant has been regularly indicted, tried and convicted in a *State* Court, his only remedy is to carry the judgment to the Court of last resort, and thence by writ of error to the Supreme Court of the United States, and that it is too late for a *habeas corpus* to issue from a *Federal* Court in such a case. This might be so if the proceedings in the *State* Court were merely erroneous; but where it is void for want of jurisdiction, *habeas corpus* will lie, and may be issued by any Court or Judge invested with supervisory jurisdiction in such case," (*Ex parte Lange*, 18 Wall., 163).

The Circuit Justice, after stating the general rule that "where it appears by the return to the writ that the prisoner is confined on a regular charge and commitment for a criminal offense, and especially if he be confined in execution after a conviction, he will be at once returned into custody," reviews the several acts of Congress in historical order, and after quoting the words of the Act of February 5, 1867, that "in all cases where any person may be restrained of his or her liberty *in violation of the Constitution*," and the words making the writ issuable, in such cases, by "the several Courts of the United States, and the several Justices and Judges of said Courts within their respective jurisdictions," says:

"The present case clearly belongs to the last category. The relator was certainly restrained of his liberty in violation of the law of the United States. And although it may appear unseemly that a prisoner, after conviction in a State Court, should be set at liberty by a single Judge on *habeas corpus*, *there seems to be no escape from the law*. If it were a case in which the State Court had jurisdiction of the offense, the general rule of the common law would intervene and require that the prisoner should be remanded, and left to his

writ of error. In such a case, although the judgment was erroneous, the imprisonment would not be a violation of the Constitution or laws of the United States. The judgment may be wrong, but the imprisonment under it would be right until the judgment was reversed. But, as before shown, *the State Court had no jurisdiction of the offense.*"

The opinion closes thus:

"It might be a wise amendment of this law to provide that in all cases after conviction the party should put to his writ of error to the Supreme Court of the United States. The above statutes are condensed in section 753 of the Revised Statutes of the United States. They have had the effect greatly to enlarge the jurisdiction in the Courts of the United States by *habeas corpus* since the first enactment on the subject in 1789. They have removed all impediment to its use which formerly existed where the prisoner was committed under State authority, provided his imprisonment is contrary to the United States Constitution or laws."

This case—*Ex parte Bridges*—be it observed, was decided on circuit in 1875, though when the revised opinion was prepared or filed, we have no means of knowing. It was made, therefore, *after*, and doubtless in view of, the Act of March 27, 1868, 15 Stat., 44, which took away all jurisdiction from this Court of appeals or writs of error, to review a decision of a Circuit Court upon a writ of *habeas corpus* in the case of a person "alleged to be restrained of his liberty in violation of the Constitution or any law or treaty of the United States."

Ex parte Lange, 18 Wall., 163, was decided in 1873, and affirmed in a specially solemn (deliberate) manner the doctrine of this Court, upon all its precedents, that "where a prisoner shows that he is held under a judgment of *a Federal Court* made without authority of law, this Court will, by writs of *habeas corpus* and *certiorari*, look into the record so far as to ascertain that fact, and if it is found to be so, *will discharge the prisoner.*"

The *Lange* case is in all respects one of the most impressive precedents on questions of *habeas corpus* in this Court. Without invidious comparison, it may be said that the principles of this writ and its applications, as well as the controlling efficacy of the Constitution and the binding obligation resting on Courts to enforce its pro-

visions, particularly what the Court there calls "the salutary principles of the common law" which have been "embodied in the Constitutions of the several States and of the United States,"—referring specially to the provisions in support of personal liberty,—are treated with unsurpassed fullness and vigor.

In the *Lange* case the petitioner was in custody of the United States Marshal, in execution of a sentence of the Circuit Court of the United States. The controlling question was whether the Court below had authority, having imposed fine and imprisonment, and the fine having been paid, to impose imprisonment alone instead of the former sentence, and it was held that the second judgment was void for want of power, and that the petitioner *must be discharged.*

If the doubt be suggested whether the same rule holds good in the case of a mere indictment, and before a trial, the answer is that this doubt or suggestion seems to have been resolved in the case of *Ex parte Virginia*, 100 U. S., 339, where the Court said in reference to a similar suggestion:

"It is said there is nothing to appeal from, that no decision or judgment has been given in the inferior Court, and that the appeal, if any, is taken from the Grand Jury. *This is a mistake.* The bench warrant was an order of Court, and the validity of the bench warrant is the matter in question. It is true there has been no final judgment or decision of the whole case, but an appeal may lie, and in many Courts does lie, from a merely interlocutory order" (p. 342).

The petitioner here is held under the bench warrant of the Hustings Court of the City of Richmond.

The case in this Court on *habeas corpus* of *Robb vs. Connolly*, 111 U. S., 624—which was in error to the Supreme Court of California, is instructive.

The petitioner in *habeas corpus* was arrested in California and delivered to the agent of the State of Oregon as a fugitive from justice in the latter State, the arrest being made on a warrant of the Governor of California. Petitioner sued out a writ of *habeas corpus* in the Superior Court for the City and County of San Francisco, directed to Robb, plaintiff in error, and agent of the State of Oregon. Robb refused to produce the petitioner, and was therefore adjudged in contempt and committed to jail, *nisi et donec.* Robb thereupon sued out a writ of *habeas corpus* in the Supreme Court of

the State, and, upon hearing, the writ was dismissed and Robb remanded to jail. From this judgment Robb prosecuted his writ of error.

In a learned and elaborate opinion, this Court held, in brief, that "subject to the exclusive and paramount authority of the National Government, by its own judicial tribunals, to determine whether persons held in custody by authority of Courts or officers of the United States, are so held in conformity with law, the States have similar authority by their own Courts within their respective territorial limits; and if the restraint is adjudged to be illegal, to discharge the prisoner, notwithstanding such illegality may arise (solely) from a violation of the Constitution and laws of the United States" (p. 639), and the judgment below was affirmed.

The law, as it now stands, since the passage of the Act of March 3, 1885, is in effect, so far, at least, as the Circuit Court is concerned, the same as before the repeal, by the Act of March 27, 1868, of the Act of February 5, 1867.

The case of *Ex parte Yerger*, 8 Wall., 85, is, therefore, of interest and value here, a decision made in 1868. Here it was held as follows:

"That in all cases where a Circuit Court of the United States has, in the exercise of its original jurisdiction, caused a prisoner to be brought before it, and has, after inquiring into the cause of detention, remanded him to the custody from which he was taken, this Court, in the exercise of its appellate jurisdiction, may, by the writ of *habeas corpus*, aided by the writ of *certiorari*, revise the decision of the Circuit Court, and if it be found unwarranted by law, relieve the prisoner from the unlawful restraint to which he has been remanded" (p. 109).

In reaching this conclusion, the Court, by the Chief Justice, says:

"The great and leading intent of the Constitution and the law must be kept constantly in view upon the examination of every question of construction.

That intent in respect to the writ of *habeas corpus* is manifest. It is that every citizen may be protected by judicial action from unlawful imprisonment. To this end the Act of 1789 provided that every Court of the United States should have power to issue the writ. The jurisdiction thus given in law to the Circuit and District Courts is original; that given by the Constitution and the law to this Court

is appellate. Given in general terms, it must necessarily extend to all cases to which the judicial power of the United States extends other than those expressly excepted from it.

As limited by the Act of 1789, it did not extend to cases of imprisonment after conviction under sentences of competent tribunals, nor to prisoners in jail, unless in custody or by color of the authority of the United States, or committed for trial before some Court of the United States, or required to be brought into Court to testify. But this limitation has been gradually narrowed, and the benefits of the writ have been extended, first in 1833, to prisoners confined under any authority, whether State or National, for any act done or omitted in pursuance of a law of the United States, or of any order, process, or decree of any Judge or Court of the United States; then in 1842 to prisoners being subjects or citizens of foreign States in custody under National or State authority for acts done or omitted by or under color of foreign authority, and alleged to be valid under the law of nations; and finally, in 1867, to all cases where any person may be restrained of liberty in violation of the Constitution, or of any treaty of law of the United States.

This brief statement shows how the general spirit and genius of our institutions has tended to the widening and enlarging of the *habeas corpus* jurisdiction of the Courts and Judges of the United States, and this tendency, except in one recent instance, has been constant and uniform; and it is in the light of it that we must determine the true meaning of the Constitution and the law in respect to the appellate jurisdiction of this Court. We are not at liberty to except from it any cases not plainly excepted by law, and we think it sufficiently appears from what has been said that no exception to this jurisdiction embraces such a case as that now before the Court. On the contrary, the case is one of those expressly declared not to be excepted from the general grant of jurisdiction. For it is a case of imprisonment alleged to be unlawful, and to be under color of authority of the United States" *pp.* 102–103.

In *Ex parte Fisk*, 113 U. S., 713, the petitioner was held in custody by the Marshal under an order committing him for contempt in refusing to testify.

The case in which the alleged contempt arose was an action at law brought in the State Court and removed into the Circuit Court of the United States. While the case was in the State Court, an order was obtained for the examination of the petitioner before trial

under the Code of Procedure of that State. The Circuit Court of the United States proceeded, after the removal of the case, to enforce this order, and on the refusal of the petitioner to testify, imposed a fine and committed him for contempt till paid.

To be relieved of this imprisonment he prayed here the writ of *habeas corpus*. The Court says:

"When a Court of the United States undertakes by its process of contempt to punish a man for refusing to comply with an order which that Court had no authority to make, the order itself, being without jurisdiction, is void, and the order punishing for contempt is equally void. It is well settled now, in the jurisprudence of this Court, that when the proceeding for contempt in such a case results in imprisonment, this Court will, by its writ of *habeas corpus*, discharge the prisoner. It follows, necessarily, that on a suggestion by the prisoner that, for the reason mentioned, the order under which he is held is void, this Court will, in the language of the statute, make "inquiry into the cause of the restraint of liberty."

Section 752 Rev. Stat.

The Court proceeds to inquire, "Did the Court transcend its jurisdiction in fining the petitioner for contempt?" (p. 719). Finding that it did, *this Court issued the writ.*

The case of *Wales vs. Whitney*, 114 U. S., 564, the latest reported case in this Court, arose *after* the passage of the Act of March 3, 1885 (*supra*), being decided May 4, 1885.

This was an appeal from a judgment of the Supreme Court of the District of Columbia refusing to release the appellant, Wales, on *habeas corpus*.

The only point of interest here, for our present purposes, is the decision of the Court that "to make a case for *habeas corpus* there must be actual confinement or the present means of enforcing it; mere moral restraint is not enough."

Some references to the supposed force of the decision in *Ex parte Crouch*, 112 U. S., 178, in other than legal circles, leads us to say that that decision does not seem to be opposed to our views in this case.

In *Ex parte Crouch*, the statute of Virginia required a license of $75 for doing the business of a "sample merchant." The petitioner, Crouch, having acted as a "sample merchant" without such

license, was informed against, and held in custody for trial by the Hustings Court of the City of Richmond for a violation of this act. His defense was that he had tendered coupons for his license. It was not claimed that the law imposing the license was unconstitutional, nor that the Hustings Court had not full jurisdiction over the case, but only that the defendant had a valid defense arising under the Constitution.

The Court said:

"It is elementary learning that, if the prisoner is in the custody of a State Court of competent jurisdiction, not illegally asserted, he cannot be taken from that jurisdiction and discharged on *habeas corpus* issued by a Court of the United States, simply because he is not guilty of the offense for which he is held. All questions which may arise in the orderly course of the proceeding against him are to be determined by the Court to whose jurisdiction he has been subjected, and no other Court is authorized to interfere to prevent it. Here the right of the prisoner to a discharge depends alone on the sufficiency of his defense to the information under which he is held. Whether his defense is sufficient or not is for the Court which tries him to determine. If in this determination errors are committed, they can only be corrected in an appropriate form of proceeding for that purpose. The office of a writ of *habeas corpus* is neither to correct such errors nor to take the prisoner away from the Court which holds him for trial, for fear, if he remains, they may be committed."

The differences between *Ex parte* Crouch and these cases are too plain to require pointing out.

IV.

The more open question remains, Are the acts under which the prisoner has been indicted unconstitutional, or "in violation of the Constitution?"

The statutes of Virginia, which give pretended warrant for the indictment in No. 974 are as follows:

Act approved March 15, 1884, section 65 (*Record, No. 974, fols. 3, 4*). (*Acts of Assembly of Virginia*), 1883–'84, p. 590).

"TAX-RECEIVABLE COUPON BROKERS.

"65. No person shall sell tax-receivable coupons from bonds of the State of Virginia without a special license, for which privilege he shall pay one thousand dollars for each office or place of business kept for that purpose. In addition thereto, he shall pay to the State a tax of twenty per centum upon the face value of all tax-receivable coupons sold by him. At the time of making such sales he shall give to the purchaser a printed certificate, signed by him, stating the fact that he has sold such coupons to the purchaser, naming him. The said certificate shall also contain the number and amounts of the said coupons, and the date of sale. Whenever such coupons are tendered for taxes the broker's certificate shall be delivered to the collector. The said protector shall preserve the same until the first day of the following month, when he shall collect the said tax of twenty per centum from the said broker. But any stock-broker may purchase such coupons for the purpose of funding them in new three per centum bonds of Virginia."

In No. 975 the corresponding provisions of the statutes of Virginia are as follows:

(*Acts of Assembly of Virginia*, 1883–'84, sections 90, 91, pp. 596, 597).

"AN ATTORNEY-AT-LAW—WHERE HE MAY PRACTICE.

"90. Every attorney-at-law, in addition to being licensed, sworn and admitted to prosecute or defend actions or other proceedings in the Courts of this Commonwealth, on the retainer of clients, shall obtain a revenue license; and no person shall act as attorney-at-law or practice law in the Courts of this Commonwealth without a separate revenue license. A revenue license to practice law in any country or corporation shall authorize such attorney to practice in all the Courts of this State without additional license. Any persons violating the provisions of this section shall pay a fine of not less than fifty dollars or more than one hundred dollars for each offense. Any person who shall appear before any committee of either branch of the General Assembly, and for fee, reward or compensation shall speak, write or print, or use before them any argument for or against measure or proposition to be passed upon by the General Assembly, except counsel appearing in contested elec-

tion cases, cases of impeachment of public officers, or before committees appointed to investigate charges preferred against public officers, shall pay a license tax of one hundred dollars. Such person may, by the chairman or any other member of any committee, be required to state on oath whether or not he expects to receive any fee, compensation or reward for services rendered or information furnished upon any measure of legislation before, or to be brought before the same. For any violation of this provision, the person so offending shall be deemed guilty of misdemeanor, and on conviction thereof shall be confined in jail not more than one year, and fined not less than two hundred dollars."

"LICENSES TO ATTORNEYS-AT-LAW.

"91. Every attorney-at-law who has been licensed for less than five years shall pay fifteen dollars; and on attorneys who have been licensed and practiced for five years and more, twenty-five dollars; provided that no attorney-at-law shall be required to pay more than fifteen dollars whose receipts are less than five hundred dollars per annum; provided, further, no attorney licensed under this act shall be allowed to bring suit against the commonwealth or any treasurer or collector of taxes, for the recovery of money for coupons tendered for taxes, unless he take out a special license therefor; for which privilege he shall pay a specific license tax in addition to the tax required under this section, of two hundred and fifty dollars."

The provisions of law making the present acts of the prisoner criminal are as follows:

(*Code of Va., Tit. 12, Ch. 34, p. 346*): "SEC. 86. Any person who shall engage in or exercise any business, employment or profession without a license, if a license shall be required by law, or shall in any manner violate the license, or revenue laws of the State, if no specific fine is imposed for such violation, shall pay a fine of not less than thirty dollars nor more than one thousand dollars for each offense."

Most briefly stated, the question is, Is it, or is it not, in violation of the Constitution to enact and provide that the selling of a coupon of the bonds in question, or the bringing of a suit to recover money paid for taxes after tender of the coupons of such bonds, shall be unlawful and criminal, except after procuring a special license therefor.

If yea, the prisoner is held "in violation of the Constitution," and the decision of the Circuit Court in both cases must be reversed.

No argument is now permissible in this Court to show that a contract—perfect, complete, indefeasible, and enforceable—was made by the issue and acceptance of the bonds of March 30, 1871, and that the coupons here in question are the evidence and expression of such contract.

Not only this, but it is also settled that any State enactments, called laws, which in effect impair the obligation of such contract, are, under the Constitution, void.

Hartman vs. Greenhow, 102 U. S., 672–679.
Antoni vs. Greenhow, 107 U. S., 769, 771, 775.
Poindexter vs. Greenhow, 114 U. S., 270, *passim*.

In the light of these settled conclusions of this Court, what is to be said of the acts of the Assembly of Virginia here in question?

What is it that these acts do, or attempt to do?

In the first case—No. 974—the Act there involved *forbids any person from selling tax-receivable coupons without a special license of one thousand dollars for each office or place of business kept for that purpose.*

In the second case—No. 975—the act, by *proviso*, provides that *no licensed attorney shall bring any suit for the recovery of money for coupons tendered for taxes unless he takes out a special license therefor, for which he shall pay two hundred and fifty dollars, in addition to his ordinary license tax as an attorney.*

All this is in the plainest and most unmistakable terms.

If it were a new question in this Court, it would be easy, as a matter of forensic reason, to show that *the degree* in which the obligation of a contract is impaired by State legislation, is immaterial on the question of constitutionality. But this Court has settled that by express decisions.

In *Green vs. Biddle*, 8 Wheat., 1, the Court said: "The objection to a law, on the ground of its impairing the obligation of a contract, can never depend upon the extent of the change which the law effects in it. Any deviation from its terms, by postponing or accelerating the period of performance which it prescribed, impos-

ing conditions not expressed in the contract, or dispensing with the performance of those which are, *however minute or apparently immaterial* in their effect upon the contract of the parties, *impairs its obligation*."

In the same case, it was further said: "Nothing, in short, can be more clear, upon principles of law and reason, than that a law which denies to the owner of land a remedy to recover the possession of it, when withheld by any person, however innocently he may have obtained it; or to recover the profits received from it by the occupant; or which clogs his recovery of such possession and profits *by conditions and restrictions tending to diminish the value and amount of the thing recovered*, impairs his right to, and interest in, the property."

The Court said: "It is no answer that the acts of Kentucky now in question are regulations of the remedy and not of the right to the lands. If these acts so change the nature and extent of existing remedies as materially to impair the rights and interests of the owner, they are just as much in violation of the compact as if they directly overturned his rights and interests."

In *Jackson vs. Lamphire*, 3 Pet., 280, the Court said:

"It is within the undoubted power of State Legislatures to pass recording acts, by which the elder grantee shall be postponed to a younger if the prior deed is not recorded within the limited time; and the power is the same whether the deed is dated before or after the passage of the recording act. * * * Such, too, is the power to pass acts of limitations and their effect. Reasons of sound policy have led to the general adoption of laws of both descriptions, and their validity cannot be questioned. The time and manner of their operation, the exceptions to them, and the acts from which the time limited shall begin to run will generally depend on the sound discretion of the Legislature, according to the nature of the title, the situation of the country and the emergency which leads to their enactment. Cases may occur where the provisions of a law on those subjects *may be so unreasonable as to amount to a denial of a right and call for the interposition of the Court*."

In *McElmoyle vs. Cohen*, 13 Pet., 312, and again in *Townsend vs. Jemison*, 9 How., 407, the Court held that statutes of limitation related to the remedy and did impair the obligations of contracts.

But even in respect to such acts it has always been held that

a reasonable time for bringing actions must be allowed by the new law.

In *Bronson vs. Kinzie*, 1 How., 317, referring to the remark in *Green vs. Biddle* (*supra*), that "if acts so change the law and extent of existing remedies as materially to impair the rights and interests of the owner they are just as much a violation of the compact as if they directly overturned his rights and interests," the Court says:

"We concur entirely in the correctness of the rule above stated. It is difficult, perhaps, to draw a line that would be applicable in all cases between legitimate alterations of the remedy, and provisions which, in the form of remedy, impair the right. But it is manifest that the obligation of the contract, and the rights of a party under it may, in effect, be destroyed by denying a remedy altogether, *or may be seriously impaired by burdening the proceedings with new conditions and restrictions, so as to make the remedy hardly worth pursuing.* And no one, we presume, would say that there is any substantial difference between a retrospective law, declaring a particular contract or class of contracts to be abrogated and void, and one which took away all remedy to enforce them, or *encumbered it with conditions that rendered it useless or impracticable to pursue it.*"

Speaking again of the remedy the Court says:

"It is the part of the municipal law which protects the right, and the obligation which enforces and maintains it. It is this protection which the clause in the Constitution now in question mainly intended to secure. * * * And it would ill become this Court under any circumstances to depart from the plain meaning of the words used, and to sanction a distinction between right and remedy, which would render this provision illusive and nugatory—mere words of form affording no protection, and producing no practical result."

In *McCracken vs. Hayward*, 2 How., 608, this Court, in holding a law of Illinois providing that a sale shall not be made of property levied on under an execution, unless it will bring two-thirds of its valuation, as fixed by three householders, unconstitutional and void, again lays down the general principles, thus:

"In placing the obligation of contracts under protection of the Constitution, *its framers looked to the essentials of the contract* more than to the forms and modes of proceeding by which it was to be

carried into execution; annulling all State legislation which impaired the obligation, it was left to the State to prescribe and shape the remedy to enforce it. The obligation of the contract consists in its binding force on the party who makes it. *This depends on the laws in existence when it is made;* these are necessarily referred to in all contracts, and forming a part of them as the measure of the obligation to perform them by the one party, and the right acquired by the other. There can be no other standard by which to ascertain the extent of either than that which the terms of the contract indicate, according to their settled meaning; when it becomes consummated, the law defines the duty and the right, compels one party to perform the thing contracted for, and gives the other a right to enforce the preformance by the remedies then in force. If any subsequent law affect to diminish the duty or to impair the right, it necessarily bears on the obligation of the contract in favor of one party to the injury of the other; hence, any law which, in its operation, *amounts to a denial or obstruction of the rights accruing by a contract*, though professing to act only on the remedy, *is directly obnoxious* to the prohibition of the Constitution."

In *Planters' Bank vs. Sharp*, 6 How., 301, the Court, in holding void a law of Mississippi, said:

"One of the tests that a contract has been impaired is, that *its value has by legislation been diminished.*

It is not by the Constitution to be impaired at all. *This is not a question of degree or manner or cause, but of encroaching in any respect on its obligation, dispensing with any part of its force.*"

In *Curran vs. Arkansas*, 15 How., 304, the Court stated the general principles thus:

"It by no means follows, because a law affects only the remedy, that it does not impair the obligation of the contract. The obligation of a contract, in the sense in which those words are used in the Constitution, is that duty of performing it which is recognized and enforced by the laws. And if the law is so changed that the means of legally enforcing this duty are materially impaired, the obligation of the contract no longer remains the same."

The case of *Von Hoffman vs. Quincy*, 4 Wall., 535, contains a discussion of the present question, as well as a review of the leading cases in this Court up to that time (1866). In this case the several

acts under which certain bonds of the city had been issued provided that a tax should be levied annually sufficient to pay the interest. A subsequent act, restricting the power of taxation to a sum not sufficient to pay the annual interest, was held to be a law impairing the obligation of the contract.

The Court, after noticing the leading cases in this Court, says:

"Nothing can be more material to the obligation than the means of enforcement. Without the remedy, the contract may, indeed, in the sense of the law, be said not to exist, and its obligation to fall within the class of those moral and social duties which depend for their fulfillment wholly upon the will of the individual. The ideas of validity and remedy are inseparable, and both are parts of the obligation which is guaranteed by the Constitution against invasion. The obligation of the contract is the bond which binds the parties to perform their agreement. *The prohibition has no reference to the degree of impairment.* THE LARGEST AND THE LEAST ARE ALIKE FORBIDDEN."

"It is competent for the State to change the form of the remedy, or to modify it otherwise, as they may see fit, provided no substantial right secured by the contract is thereby impaired. No attempt has been to fix definitely the line between alterations of the remedy, which are to be deemed legitimate and those which under the form of modifying the remedy, impair substantial rights. Every case must be determined upon its own circumstances. Whenever the result last mentioned is produced, the act is within the prohibition of the Constitution, and to that extent void. If these doctrines were *res integra* the consistency and soundness of the reasoning which maintains a distinction between the contract and the remedy—or, to speak more accurately, between the remedy and the other parts of the contract—might, perhaps, well be doubted."

In *Walker vs. Whitehead*, 16 Wall., 314, the Court, in holding a law of Georgia unconstitutional, thus states the doctrines which are to be considered as settled in this Court:

"The Constitution of the United States declares that "no State shall pass any law impairing the obligation of contracts."

These propositions may be considered consequent axioms in our jurisprudence;

The laws which exists at the time of the making of a contract, and when it is to be performed, enter into and form a part of it.

This embraces alike those which affect its validity, construction, discharge and enforcement.

Nothing is more material to the obligation of a contract than the means of its enforcement. The ideas of validity and remedy are inseparable, and both are parts of the obligation, which is guaranteed by the Constitution against impairment.

The obligation of a contract "is the law which binds the parties to perform their agreement."

Any impairment of the obligation of a contract—*the degree of impairment is immaterial*—is within the prohibition of the Constitution.

The States may change the remedy, provided no substantial right secured by the contract is impaired. Whenever such a result is produced by the act in question, to that extent it is void. The States are no more permitted to impair the efficacy of a contract in this way than to attack its validity in any other manner. *Against all assaults coming from that quarter, whatever guise they may assume*, the contract is shielded by the Constitution. It must be left with the same force and effect, including the substantial means of enforcement, which existed when it was made. The guarantee of the constitution gives it protection to that extent." (pp. 317, 318).

All this array of authorities may, we think, be condensed into this proposition:

Any State law which *changes, clogs, delays or burdens* the mode for enforcing a contract, which existed at the time the contract was made, so as to lessen the efficiency or *diminish the value of the contract, however minutely*, impairs its obligation within the meaning of the Constitution of the United States.

In determining whether a change in the rights and remedies of the bondholder is such a change as impairs the obligation of a contract, it seems a fair test to ask, would the party whose rights and remedies are affected have made the contract if he had anticipated such a change? For instance, to take the case in hand, would any one have purchased a bond of the State of Virginia, except at an enormous discount, if he had anticipated that a law could or might be passed which should impose upon him a license tax of $1,000 before he could sell a single coupon from the bond?

In other words, would any sane man have paid $1,000 for a bond of the State of Virginia, if he had anticipated that a law could be

passed imposing upon him a tax of $1,000 as a condition of selling a single coupon of $30 from the said bond? Such a question admits of but one answer. If such a law had been on the Statute Book of Virginia when she undertook to issue her bonds, it is too palpable for discussion that not a single bond could have been sold.

Since then (1) it is immaterial to inquire into the degree to which a State act of legislation impairs a contract, and since (2), a true test of impairment is the question whether or not the act imposes an essential burden on the contract not originally imposed, and since (3), anything which dimishes the value of a contract impairs its obligation, it seems to be necessary to look only to the operation and effect of the acts here in question on the coupon contract.

V.

1. That the sale of the coupons, separate from the bonds, is an essential element of value here, is plain.

2. That any Act, or action, which prevents or injuriously hinders the free sale of the coupons impairs the obligation of the contract, is equally plain.

Here, it is to be observed that the right of sale is one of the essential incidents of the right of property, and any interference with the right of sale is, to that extent, taking away private property without due process of law; and in the case of a contract, it is a plain diminution of its value, and hence it impairs its obligation.

It is too elementary to warrant citations, that what Blackstone says is still our law on this point: "The third absolute right, inherent in every Englishman, is that of property, which consists in free use, enjoyment *and disposal* of all his acquisitions without any control or diminution, save only by *the laws of the land*." 1 Bl. Com., *138.

A special license required of persons selling coupons, and of persons bringing coupon suits, is a tax on the coupons.

The right or power of the State to tax occupations for revenue,

by way of licenses, is fully conceded in this argument. The limits of such taxation are found, for the most part, in good policy, and the interest of the Government in dealing fairly by its citizens.

Such licenses, or license taxes, are "taxes" in the proper and legal sense of the term.

In *Brown vs. Maryland*, 12 Wheat., 419, the question was, whether a Maryland act requiring all importers of foreign goods by the bale or package, &c., to take out a license of $50 was repugnant or not to the Constitutional provision that "no State shall, without the consent of Congress, pay any impost or duty on imports or exports except what may be absolutely necessary for executing its inspection law," and the provision that Congress shall have power "to regulate commerce with foreign nations, among the several States, and with the Indian tribes."

Chief Justice MARSHALL held, first, that "an impost, or duty on imports, is a custom or tax levied on articles brought into a country," and second, in answer to the argument that a license required of the importer is not a tax on articles imported, but on the person, he says: "It is imposible to conceal from ourselves that this is varying the form without varying the substance. It is treating a prohibition, which is general, as if it were confined to a particular mode of doing the forbidden thing. All must perceive that a tax on the sale of an article, imported only for sale, is a tax *on the article itself*. It is true, the State may tax occupations, generally, but this tax must be paid by those who employ the individual, or *is a tax on his business*."

In Ward vs. Maryland, 12 Wall., 418, this Courts say of a license exacted by a Maryland statute which required a non-resident under penalty, to obtain a license of $300 to sell goods within the State, the same not being required of residents of Maryland; that such an exaction, called by what name it may be, is a tax upon the goods or commodities sold, as the seller must add to the price to compensate for the sum charged for the license, which must be paid by the consumer or seller himself; and in either event the amount charged is equivalent to a direct tax upon the goods or commodities.

In Welton vs. Missouri, 91 U. S., 275, 279, it was held that a license exacted by the State of Missouri from dealers in goods must be regarded as a *tax upon such goods themselves*.

The license, therefore, exacted in these cases, is a tax on the coupons.

This Court in *Hartman vs. Greenhow*, 102 U. S., 672, held that a tax upon coupons, when separated from the bonds and held by another person, impairs the coupon contract.

Any State statute, therefore, which lays a tax on the coupons, though in the shape only of a license for the pursuit of occupations which concern the coupons, and on which some part of their value depends, is void, and any proceedings against a person for failure to pay such tax are also void.

That the value of the coupons is diminished by the licenses in question is plain; such *must be* their effect; such must be held to have been their intent, their *raison d'être.*

It is to be observed further that this Act of Virginia does not impose a license upon a man for the carrying on of the BUSINESS of buying or selling coupons, or the business of note broker, or any other *business as such*, but imposes a license upon *any individual, whatever his business may be*, who undertakes to sell a *single coupon which he may own*, and besides, imposes a license *equal to the face value of the bond* from which the coupon is taken.

This is simply *confiscation;* it amounts to saying by the State, "if you undertake to exercise the right of ownership of one of our bonds, and sell a single coupon from the bond, we will confiscate the whole bond and compel you to pay us the face value of the bond, $1,000, while we will pay you nothing." To say that this is adding insult to injury would be to use a phrase which would be too insipid for the occasion. The tax of $1,000 amounts to a *prohibition on sales by any one but a capitalist.* A poor man owning but a single bond of the State of Virginia, par value $1,000, is prohibited from selling a single coupon from that bond, amounting to $30, unless he pays the State of Virginia the face value of the bond!

Leaving out of view, therefore, altogether the fact that the thing, the sale of which the State prohibits by taxation, is an obligation of the State itself, we contend that even if it were not an obligation of the State itself, but were the bond of some other corporation, the act would be equally unconstitutional. Suppose the State of Virginia should pass an act providing that any person who desired to sell a coupon from the bonds of the N. Y., Lake Erie & Western R. R. Co. (for instance), should pay a license fee to the State of Virginia of $1,000, and a tax of 20 per cent. of its par value besides, would not this clearly be taking away private property without due process of law? It prohibits the holder of a $1,000 bond of the Erie

R.R. Co. from disposing of a coupon without paying to the State of Virginia the *whole value of the bond*. So, if the State of Virginia should undertake to pass an act prohibiting a man from selling a horse, except upon paying a license to the State of Virginia of $1,000, this would be likewise taking away property without due process of law. It would be confiscating the man's horse, since to take away the right of sale, or to confiscate the purchase price of the horse, is as much destructive of the right of property as would be a taking away of the horse itself.

It is to be observed that the tax is not in the shape of a tax upon the *business* of buying and selling of horses, which, if reasonable, would be lawful, but it is a tax upon individuals *not carrying on the business* of buying and selling, which virtually prohibits the sale of a single horse.

So in the case at bar, the State of Virginia does not undertake to put a license tax upon the business of buying and selling bonds, or coupons of the State of Virginia, but undertakes to impose a tax upon single sales, even of a single coupon, and it imposes a tax so enormous as to be of itself a confiscation.

This is the result of considering the question without reference to anything except *the acts themselves*.

But when considered as part of a system of legislation, or series of Acts, such as have been so amply spread before this Court heretofore, and which were characterized in *Poindexter vs. Greenhow*, as "forming a single scheme, the undisguised object of which is to enable the State to rid itself of a considerable portion of its public debt, and to place the remainder on terms to suit its own convenience, without regard to the obligation it owes to its creditors," the certainty of their evil and unlawful intent becomes, if possible, clearer.

These licenses are palpably parts of a system of legislation hostile to the observance and enforcement of the coupon contract.

Evidence of this sinister intent is spread upon the same page which enacts the license here in question, thus: After requiring a special license for selling tax-receivable coupons, together with the payment to the State in addition of 20 per cent. of the coupons sold, the section concludes as follows: "But any stock-broker may purchase such coupons for the purpose of funding them in *new*

three per cent. bonds of Virginia," that is, without paying the license or the twenty per cent. of the coupon.

A Virginian may deal freely in coupons, provided he wishes to fund them into *the Riddleberger bonds at three per cent. interest!*

It is scarcely necessary to discuss separately the case of a special license to bring "*a suit to recover money for coupons tendered for taxes.*"

Such a license is, as in the case of the special license required to sell a coupon, a tax on *the coupon itself.*

To bring such a suit requires the services of an attorney-at-law, and the cost of such special license *falls on the coupon-holder alone.*

As a special license it is not a tax or license on *an occupation or business at all*, but on the coupon or its holder.

It is an effort to embarrass the new remedy afforded by the Act of January 14, 1882, which was considered in *Antoni vs. Greenhow*, 107 U. S., 769, as well as a tax on the coupon itself, which was pronounced illegal in *Hartman vs. Greenhow*, 102 U. S., 672.

The present Acts of Virginia are put in the guise of License Acts, but while the power of a State to license occupations is not denied, it is well to remember that this power is not without its limitations, and it is for the Courts to look beneath all forms or disguises, and see whether a given act is really an exercise of the license power or not.

All this is well set forth in the very recent case of *In re Jacobs*, 98 N. Y., 98, which was a case where the Legislature in the professed exercise of the "police" power had forbidden the making of cigars in private houses in the cities of New York and Brooklyn.

Judge EARL, closing an elaborate examination of authorities, says:

"These citations are sufficient to show that the police power is not without limitations, and that in its exercise the Legislature must respect the great fundamental rights guaranteed by the Constitution. If this were otherwise, the power of the Legislature would be practically without limitation. In the assumed exercise of the police power in the interest of the health, welfare or the safety of the public, every right of the citizen might be invaded and every constitutional barrier swept away.

"Generally it is for the Legislature to determine what laws and regulations are needed to protect the public health and secure the public comfort and safety, and while its measures are calculated, intended, convenient and appropriate to accomplish these ends, the exercise of its discretion is not subject to review by the Courts. But they must have some relations to these ends. Under the mere guise of police regulations, personal rights and private property cannot be arbitrarily invaded, and the determination of the Legislature is not final or conclusive. If it passes an act ostensibly for the public health, and thereby destroys or takes away the property of a citizen, or interfere with his personal liberty, then it is for the Courts to scrutinize the act and see whether it really relates to, and is convenient and appropriate to promote the public health.

It matters not that the Legislature may in the title to the act, or in its body, declare that it is intended for the improvement of the public health. Such a declaration does not conclude the Courts, and they must yet determine the fact declared and enforce the Supreme Law. In matter of Ryers (72 N. Y., 1), FOLGER, J., speaking of the Drainage Act then under consideration, says: "The Legislature has done no more than the Constitution permitted in providing in general terms a way for the promotion and preservation of the public health. It is still for the judiciary to see to it that each occasion presents the necessity for the work, and that the purpose to be reached is public." In Town of Lake View vs. Rose Hill Co. (70 Ill., 191), the Court, speaking of police power, says: "As a general proposition, it may be stated that it is in the province of the law-making power to determine whether the exigencies exist, calling into exercise this power. What are the subjects of its exercise is clearly a judicial question." Even the power of taxation, which is one of the broadest possessed by the Legislature, is not without its limitations, and its action in reference thereto may be scrutinized by the Courts; and that which is done under the guise of taxation may be condemned as sheer spoliation and confiscation without due process of law. (Weismer vs. Village of Douglas, 64 N. Y., 91; Stuart vs. Palmer, 74 *Id.*, 183; People vs. Equitable Trust Co., 96 *Id.*, 387.) The Legislature may condemn or authorize the condemnation of private property for public use, and it may, in the exercise of its discretion, determine when, and upon what property the power of eminent domain may be exercised; but its exercise is not beyond the reach of judicial inquiry. Whether or not a use is a public one, which will justify the exercise of the power, is a judicial question.

It may be difficult sometimes to determine whether a use is public or private. Although the Legislature may declare it to be public, that does not necessarily determine its character; it must in fact be public, and if it be not, no legislative fiat can make it so, and any owner of property attempted to be taken for a use really private can invoke the aid of the Courts to protect his property rights against invasion. (Rockwell vs. Nearing, 35 N. Y., 302; Matter of Townsend, 39 *Id.*, 171; Matter of Deansville Cemetery Association, 66 *Id.*, 569; Matter of Eureka Basin Warehouse and Manufacturing Co., 96 *Id.*, 42.) The general Government is one of limited powers particularly specified in the Federal Constitution. But in addition to the powers granted, it is provided in the Constitution that Congress shall have power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers." Under this provision Congress is not the final judge of what is "necessary and proper," but its laws must have a legitimate end in view, must be within the scope of the Constitution, must be appropriate and plainly adapted to that end, and not prohibited by, but consistent with, the letter and spirit of the Constitution; and whether the laws passed under the implied powers contained in the section cited are of the character mentioned and thus justified is always open to judicial inquiry. (McCulloch vs. Maryland, 4 Wheat., 316, 421; Hepburn vs. Griswold, 8 Wall., 603; Legal Tender Cases, 12 *Id.*, 457; 110 U. S., 421.) If it were for Congress to determine when these implied or incidental powers should be exercised, its powers would be without any restraint, and instead of being a body with limited powers, it would, in its own discretion, have general and unlimited powers of legislation. "Whatever meaning," says Mr. Madison (1 Ann. of Cong., 1848), "the clause of the Constitution conferring all necessary and proper means to carry into effect the enumerated powers may have, none could be admitted that would give an unlimited discretion to Congress." And in Marbury vs. Madison (1 Cranch, 137), Chief Justice MARSHALL says: "To what purpose are limitations committed to writing, if those limits may at any time be passed by those intended to be restrained? The distinction between a government with limited and unlimited power is abolished if those limits do not confine the persons on whom they are imposed." These citations are apt to show how the police power may, and how it ought not to be exercised, and how far its exercise is subject to judicial inquiry. A law enacted in the exercise of the police power must in fact be a

police law. *If it be a law for the promotion of the public health, it must be a health law, having some relation to the public health*" (*pp.* 110–112).

These so-called License Acts of Virginia are not only an attempt to prevent the payment of a considerable part of the "debts, dues and demands due the State" of Virginia in tax-receivable coupons, but they are an attempt to destroy the value and paralyze the use of such coupons for the purposes for which they were intended, under the thin cover of license acts which strike at the essential features of value of such coupons.

The Acts under which the plaintiff in error was indicted having been shown to me plainly unconstitutional and void, the State Court was without jurisdiction to act under them, and the confinement of the plaintiff in error was "in violation of the Constitution."

The judgments of the Circuit Court should, therefore, be reversed.

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Of Counsel.